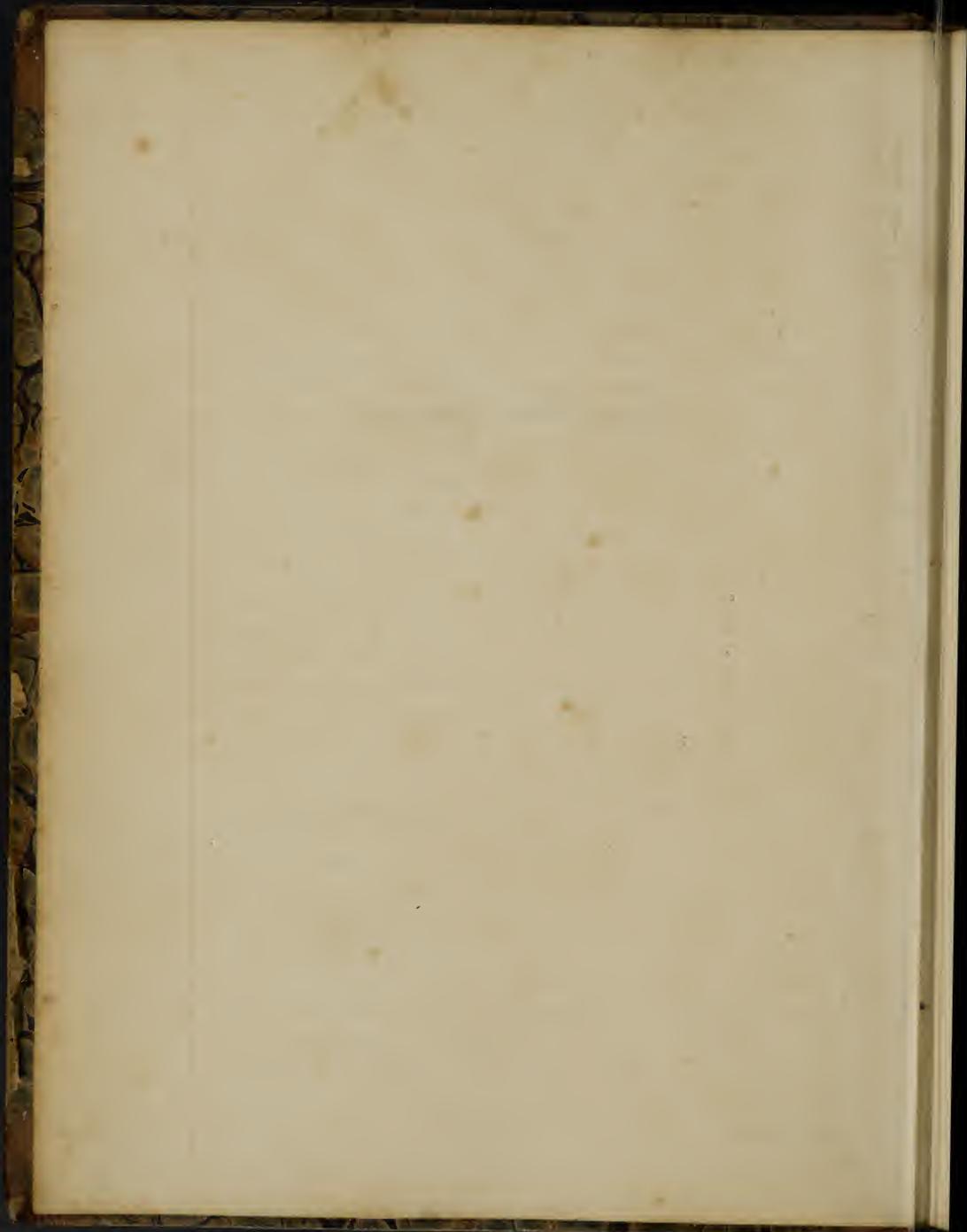
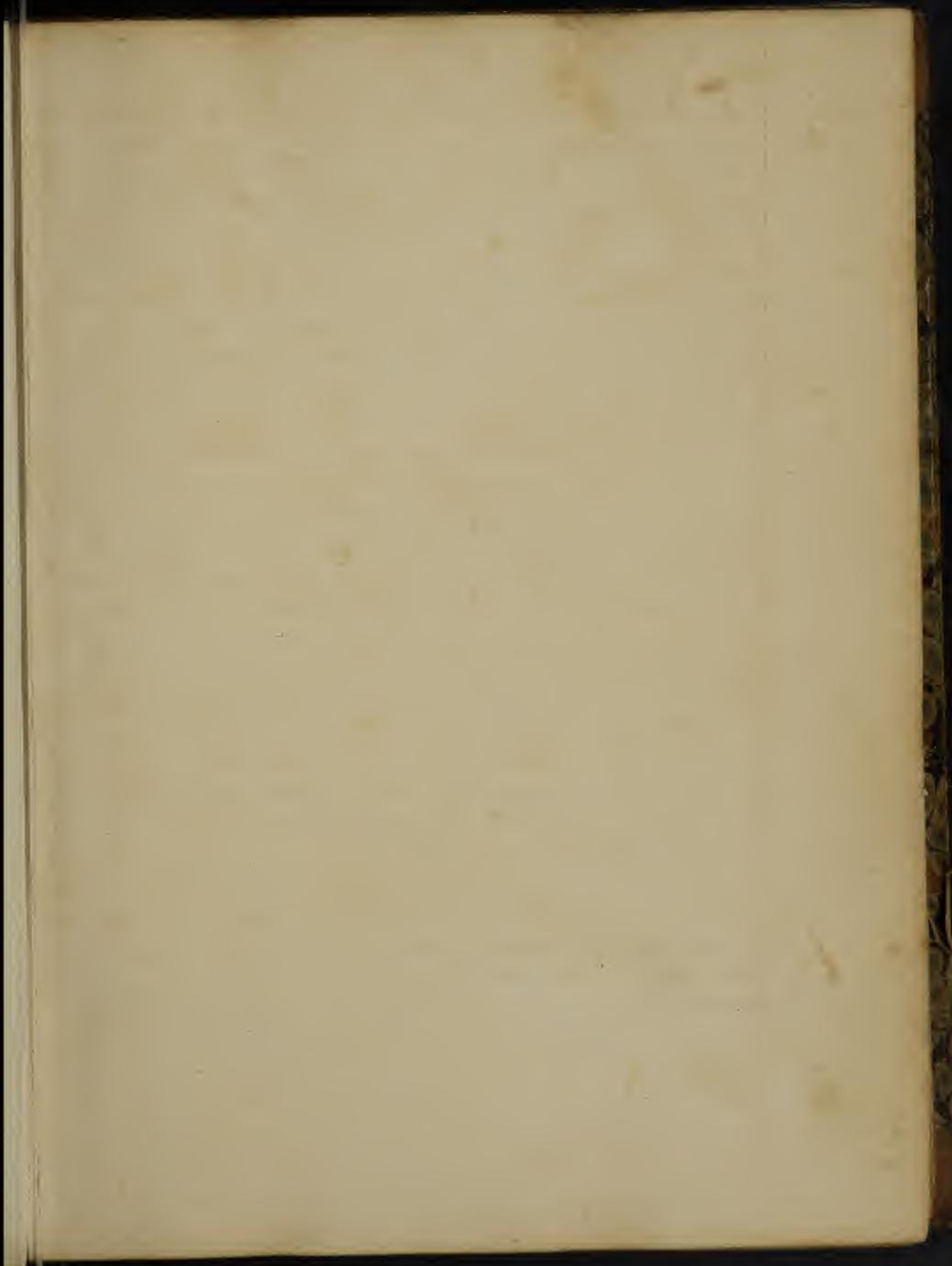
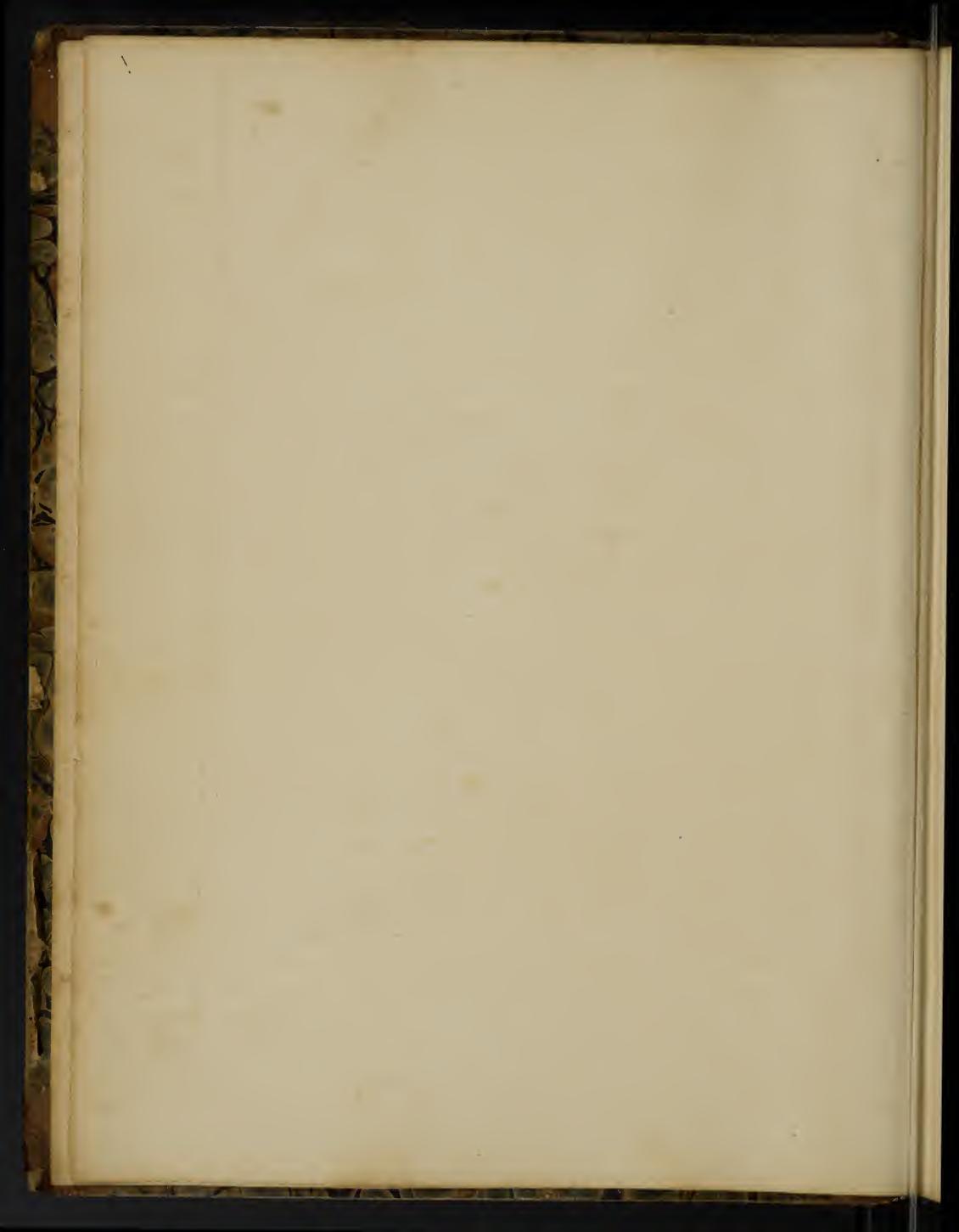


Origen Stans Seymou,







(1)

(11)

Real Property (No 19).

Devise.

This is the last mode of alienation
which I propose to consider

This title comprehends great variety of
learning

A devise is a mode of alienation &
is a testamentary disposition of real property ^{Don't Dis}
or a disposition of real property to take effect ^{Don't Dis} after
after the death of the owner. ^{will p 497}

The term will includes generically,
the disposition of real & personal property
A testament is a disposition of personal
property to take effect on the death of the
owner.

A will in its strict sense is the ^{for no}
appointment of an executor it is not necessary ^{Don't Dis} will
to a will that any property be disposed
of. - If to the appointment of an exec or
superadded the disposal of personal property
the instrument is called a "will & testament"

The right of devising real property ^{2 Bl 57.373}
is said to have existed among the anglo ^{Don't Dis}
saxons. but was abolished entirely in the
feudal system. for the same reason which operated
to prevent alienation inter vivos operated to prevent
alienation by devise -

(2)

Devises, terms for years & chattel ~~and~~ quibly as well as personal property might have been devised during the feudal system -

76078 In whether a term for years could be
Pou^t 245 devised de novo or created de novo by devise

2 Ad 375 - real property contained to the time of
Tow^t 8.63 Henry 8th Lbs! this restraint was evaded
236. by the doctrine of uses, however during the
60 Littell W greater part of this time. For the chancery
of that time held that tho' a legal estate
in land could not be devised yet the use
of land might be devised. This practice
was stopped by the st of uses, Only five
yrs after this st the st of devises was enacted
this st provides that all persons having
a sole estate in fee simple ^{a full} coparcenary
or tenancy in common in lands tenements
& heredit. might devise two thirds of
tho held by military tenure & the
whole of tho held in socage. The stat
is explained 34 & 5th. Henry 8th

This is what is called "the stat of
wills".

Pou^t 42.10, And as by st 12 Car 2^d all tenures
2 Ad 77.375 were converted into common socage except
copyhold all lands in wht there was a
fee simple might be devised except copy hold.
from the time of this statute..

Certain modes of making devises was Devised.
 provided by 29 Car 2. the st of funds & properties. Pow of devising.
 this st provides the solemnities
 necessary to a devise.

Our st authorizing devises is similar
 to Henry 8. but extends the right further.
 the words of our st are "all lands & other
 estates" may be devised by devise in writing &c
 The explication in the revision of 1821 is that all persons & bount
 of the age of 21 of sound mind to shall have power to dispose of Tit 32. c 1 s 1
their real estate We have also a st similar to
 the devising clause in 29 Car 2 & therefore & bount
 constructions given in England to their stat Tit 32. c 1 s 2
 are generally considered here as law.

The power of devising then in Engl? Pow 47. 8
 depends on the st of devises 29 Hen 8th as of 28 Eliz 16.
 explained by 34 & 35 Henry 8. & the mode is regulated
 by the devising clause in 29 Car 2.

The power of devising in this state
 depends on a statute similar to that of Hen 8th
 & bount Tit 32 c 1 s 1.

And the mode of making devises
 depends upon a statute similar to 29 Car 2 / st bount
 Tit 32. c 1 s 2 & onward —

(4)

Devise under the Statute of Henry VIII.

a devise under the St. Hen⁸ & Ch³ is called
an 'irregular instrument in writing'

This, it prescribes nothing except that
Dong 377:9 the devise be in writing. Hence under this
Pnt. 11-14. It was determined that any writing
48. manifesting an intention to make a
testamentary disposition of real property if
not contrary to the rules of law, should be
considered a devise. An intention contrary to the
rules of law cannot be effected even by devise, as
an intention to create a species of estate
unknown to the law,-

An instrument then in the form of
3 Act 31^o a deed & tho' actually delivered as a deed may
1 M^o d¹⁴⁷ yet operate as a devise, if it appears on the
face of it to be a testamentary disposition

Belden^t Let as I remarked on escrows if a
Carter 4 Day. deed is delivered to a thus person purporting
to be a deed in presenti tho' to be d^e on the
death of the grantor this will be no devise but
an escrow. To make such instrument a devise
it must on the face of it appear to vest the property
on the death of the maker, again a devise may be written at diff^r
Pnt. 17- times on diff^r sheet of paper wh^{ch} need not be
1 Shows 545 connected together & all then will constitute
553. one devise if such appears to be the intention
1 Jun 548. of the testator
compl 174.

And one may make several distinct dispositions of the same subject in different instruments in the same subject at different times - Decr 1684
1705 187

Thus I. S. devises land in fee simple to A. afterwards he devises to his wife a life estate in the same estate this last is a revocation of the first devise pro tanto & is the same in effect as if he had devised to wife for life remainder to A.

and where there are two successive testamentary instruments the latter may alter & modify the former for in devises the last clause governs & the last devise takes effect in preference to a former one -

And a devise may, by referring to another instrument make that instrument a part of itself for the purpose of explaining the testator's intention - Ex I devise all the land described in, a certain deed - This deed becoming a part of the devise for the purpose of ascertaining the land. - Nov 11
2dth 273
18 Mys 530

After a devise is made & published the testator Decr 24
1705 187
may make any number of codicils by which he may Port 23 543
explain or add to the original devise & the law annexes the codicils to the first devise making them all one will or instrument this supposes that the codicil refers to the will

A codicil is an appendage to a will restraining altering it & codicil always relates in whole or in part to the same subject matter as the original instrument. If it does not in strictness it is no codicil -

A codicil always supposes a previous will ^{according to the statute} complete in itself & already executed. If one to day makes a devise of one piece of land & tomorrow of another piece of land these instruments are distinct devise & the latter cannot be called a codicil,

Devise under封. In the construction of 32-48 it was held that
 2 Bl 376. every devise must be entirely in writing but
 bro E 100 the word writing was used in its most extensive
 Powt 25.6. sense as including loose notes. memorandum. letters
 3 Dev 113. &c.

Pont 28.9 It was likewise held that the devise must be
 3 Geo 31.6 completely reduced to writing during the devisor's life
 1 Hm 72 otherwise not good.

And it was determined that a devise might
 be good in part & in part void (as if the
 direction to the scrivener from the devisor was
 1 Feb 880 to make an absolute gift & he with authority
 Pont 30 annexed a condition. the condition only was
 1 Jy 72 (n 2) void & the gift good). This indeed may now in some
 cases be law. And the same w^t be the rule now
 But if the scrivener was directed to make
 a devise on condition & it was written with
 condition. It was held that the whole devise was
 void. - This case is undoubtedly now law.

And under this st it was held that any
 2 Apr 6128 writing tho' neither signed nor sealed & the in
 Pont 31. the hand writing of another yet if one witness
 1 Sept 315. could be found to attest such devise, such writing
 2 Nov 35 was a good devise. And it is said that the testator's
 3 Dec 79 name need not appear at all in the writing.
 A descision to this effect occasioned the
 devising clause in the 29 Car 2^o, wh prescribes
 the solemnities necessary for a devise.

(7.)

Devise under the Stat of 1688

What interests or estates are not devisable,
It was formerly held that contingent interests 3 Lev 427
could not be devised. w^t contng remainders & executry fram 291
devised - Pn 34

The principle of this rule was that as
a devise was a species of alienation & since these
interests could not be aliened so the judges held
that it could not be devised.

But it is now clearly established that 1883222
such interest may be devised, as a contingent 14.8630
remainder before the conting^t happens may be 15 Jan 6203; 9
devised & upon the contingencies happening the 3.5.688.90
devise may take effect. But a naked possiblity 4.5.1.248.
cannot be devised as a conting^t power over another's land - for such interest cannot be devised when not 60.2em 44.1.4
conting^t But on the other hand a contingency
not coupled with an inc^t is not devisable (6)
that is a bare authority depending on a
contingency over the estate of another is not
devisable indeed a bare authority is never
devisable except by express provision in the
instrument creating the power.

An estate turned to a mere right is not 6.6.281.587
devisable thus if the owner of land has been (293. 405)
ousted the not barred by the st of limitation 10.5.6.611
she may not devise such land. The rule
here respecting devises follows the rule respecting alienation
by deed.

(8) What Estates are not devisable ? -

An estate per autre vie is not devisable
6 ro E 58 under H. 8. for this st comprehends only estates
6 & att 41 in fr. but it is real estate & therefore not
3 Keb 450. devisable at common law.
1. V. 428. Powt. 36-38. 218.

But by 29 Car 2^o estates per autre vie
2 Bl 259. b. w. are made devisable unless as some qualify
Powt. 37-40 the rule there is a special occupant named
that is unless the estate per autre vie is limited to
a man & his heirs.

But according to others in either case it
is devisable. and this appears to be to be the
correct opinion.

But one st seems clearly to authorize the
devise of estates per autre vie. for the ex-
preeson in our statutes are 'all real estate'
will seem to include all estates to whb
some other person has not a paramount right &
whb may continue after the death of the owner.

36 & 37. 6 Dignities offices & franchises are never dev-
10 & 11 sable tho' in many instances descendable.
Powt. 40:1 Now a fee simple is descendable but never devisable

In Comt &c. they cannot be devised
for they are not even descendable. & they are not
real property-

Powt. 10 45. 6 Copy hold lands being omitted in the statute
are not devisable. They may however be indirectly
devised by surrender to the use of the owner will &

A right of entry on lands depending on the non performance of a condition by the testator is not devisable. — The grantor has no interest in the lands until the condition ^{Prov. 46. 18.} is broken.

If it is asked why this right being similar to a contingent one may not be devised as well as a contingent interest, Answer. — The benefit of a condition is personal to him in whom favour it is made & to his representatives & a devisee therefore could not take advantage of the condition.

The Devise itself

The clause in 29. Cap 2° is that all devises of lands, tenements &c shall be in writing. 2° That the devise shall be signed by the devisor or by some other person in his presence & by his express direction & 3° it must be subscribed by three or more credible witnesses in the presence of the testator.

Our st counts upon devising as already existing in the law & for that reason it would appear to be defective. (this is the case in the old statute) but in the revision of 1821 it is altered on next page —

(10.)

Solemnities requisite for a Devise.

The Statute is almost precisely the same as
29 Car 2^o. It prescribes 1^o That all wills shall be
1^o ~~bonit~~ in writing. 2^o subscribed by the testator. 3^o
Rit 32 cl 52. that no devise of real estate contained in any
will or codicil shall be good unless such will or
codicil shall be attested by three witnesses all of them
subscribing in the presence of the testator.

The object of these provisions in these st is to
guard men in extremes agt frauds & to protect
the heirs. It is a presumption of law that
devises are made in extremes.

29 & 40. 9. The first provision then is that devises shall
be in writing but no form is prescribed
& therefore any form will w^t have been good
under the st of 48. will now be good if the
solemnities of the st of frauds are observed
so the writing may be in the form of a letter
& memorandum, &c.

Hence as under the st of wills so under this
st - frauds any instrument executed correctly
2 Atk 42 may by referring in terms to another
274. 368. instrument ~~may~~ make that instrument a
1 P 17^o m 47^o part of itself even tho' the former instrument
3 Ban 1775 or the instrument referred to is not executed
29 & 40. 9. according to the statute of frauds. thus
2 Atk 274 if a makes a devise severs his land with the
378. part of it selfs if this devise is duly executed if
the afterwards svs leases by an instrument not
executed according to 29 oac^o yet these leases tho'
they charge the land to will be good

What interests are included in the ~~estate~~ 6? [11.]

The next words are "of any lands or tenements" in our st the words are "real estate". This is descriptive of the subject matter on wh^t the Devise is to operate.

Now under this clause it has been decided 20 W^r 75 that this st does not extend to such colonies 18 U.S. 3 as were planted before the ~~statute was enacted~~ ^{the colonies were planted} Bl 382:93; & this is a general principle viz that states made ^{Const 204} before a colony emigrated from the parent country are prima facie ^{Const 411} talk 411 the law of the colony. This is the doctrine wh^t has been 1 Bl 106:8 adopted in England & wh^t has been adopted by the ^{Const 52} ^{most} ^{ablest} jurists in this country, viz that the statutes made ^{Const 369} in the parent country before the emigration are prima facie the law of the colony. those made after are not -

But a devise executed in another country 20 W^r 291 of land lying here must be executed according Pon^c 52:3 to our law. Thus if a citizen of the U.S. makes 14 B 690:1 a devise of land lying here in France the devise must Amb 254:6 be made according to the statute of this country. And if a man in ^{Const 4} being a citizen of the state makes a devise of ^{Const 4} land in Vermont the devise must be executed according to the law of Vermont. ^{See loci siti always} governs in the devise of real property & indeed always governs the disposition of real property.

Such is not the rule respecting personal property which by has no locality 11.

But the words lands & tenements in the st does not extend to any chattel interests as terms for years &c. for then are governed by the common law so that a term for 1000 years may be devised without the solemnities required by 29 Barb 2 Don^c 55 Gilber^c 164:70

(12). What subjects are within 29 car 2^d?

But a trust of inheritance is within
3 Atk 152 the statute. for instance an equity of
2 Wm 285 redemption is devisable & must be devised
Pou 258. with all the solemnities required by 29 Car 2^d

Again if a holds an estate in
trust for B 18 may devise his trust but it
must be devised with all the solemnities required
in the devise of a legal estate.

And an appointment of land made by
1 May 740 will under a power must be made by a
2 Wm 285 will executed according to the statute. Then
2 Kas 179. an estate is conveyed to trustees in trust for
Pou 48. such persons as A shall by his will appoint
38. 150. now the will or appointment must be
executed according to the devising clause
in the statute of frauds

2 Atk 268 And if a legacy is given originally out
285. of land the will creating this charge must
be executed according to the statute as
Pou 59 if a man wills thus I give to J. \$1000
to be raised out of my real estate this
is a disposition of real estate pro tanto &
therefore to be executed according to the
statute. This is diff from the case
stated before of a legacy referred to in a
devise -

And rent issuing out of land is within
the statute & the dev't of freehold rent must Po^t 59
be executed according to the Statute - Rent
is the reservation of part of the profits of
the land they therefore partake of the nature
of land

And a will giving the power to sell land 21 & 79
must be thus executed for this is indirectly Po^t 59
disposing of the land for it is giving to others
a power to dispose of land.

With regard to the solemnities.

- 1^o The devise must be written, thus
obtains under our law Po^t 25:6. 60.
- 2^o that it be signed by the testator or
by some other person in his presence & by
his express direction.

The words of our St are that it shall be
subscribed by the testator omitting the clause
'or by some other person in his presence' &

Sealing is usual in this state & in Eng^t Po^t 61.76
but it is not necessary either here or in Eng^t Co^t 264.
In the St is silent & the common law has S^t B^t Eq R 261.
nothing to do with devises for they are created by
statute.

(14) Desires. What amounts to signing within a Devise?

It was formerly held in Eng C^o that
3 Act 1 sealing alone by the testator with signing
31 Chas 2 1666 or the principle that sealing amounted
to signing within the meaning of the Stat.
2 Stra 764 But it has since been decided that
1 Milon 313 signing is necessary - this appears to be the
Pou 62.67 correct opinion for it is much more easy to
74. counterfeit a seal than a signature & then solemnly
1 Ves J 13-15 were required chiefly to guard agt this kind of fraud
17 Ves J 459.

But what amounts to signing? the name
3 Act 1.86 of the testator written by himself in any part
31 Chas 2 1666 of the instrument is construed a signing wch
1 Eq 2403 it appears that it was not intended as a
Pou 61-66 signing - In w^t this ever be suff. under our Stat -
18 Ves J 183. But suppose the testator's name is written in the commencement
1 Ves J 11. of the devise by himself but the whole instrument is
not in the hand writing of the testator? 28 Eliz 7 b.c.

But when it appears that the name of
Eng 229 the testator the written by himself in the body
241 of the instrument was not intended as a signing
1 Wm 6 180 then the devise will not be good as where the
2ou 65.6 testator manifested an intention to sign the
devise in form it was held that his writing as
name in the body of the instrument was not a
suff signing.

But where the testator's name is written in
the body of the instrument by himself & there ^{Pon^o 65:6.}
is no other signing the onus probandi lies on
the party objecting to the sufficiency of this
signing.

Westell.

The next requisite is that the devise must
be subscribed & attested by three or more
credible witnesses.

In our statute "shall be attested by three witnesses
all of them subscribing in the presence of the testator."

Now the attesting witnesses are to attend
principally to three objects. the sanity of the
testator, the signing of the testator & the ^{30 Wm^q 93}
publishing the will by the testator. ^{2 Ath 56}
They are to attend to the sanity of the ^{Pon^o 69:70}
testator for the signing contemplated by the ^{Bul^o 1264}
statute is not merely the physical act of ^{1 Bl R 365}
signing but a legal signing to wh^o h^e sanity is ^{1 Bon 417}
necessary. ^{Pon^o 113:6.}

When a devise then is offered to a ^{2 Ath 56.}
of probate or to a b^o of justice on a question ^{Bul^o 264.}
of title the devise must prove the sanity of ^{1 Bl R 365.}
of the testator The burden lies on those who ^{Pon^o 69:70.}
claim under the devise - This is diff^t from
the rule in case of deeds - The maker of a
deed is presumed to be compos but the maker
of a will is presumed ^tbe in extremis,

(76)

But the testimony of the subscribing
witnesses is not conclusive as to the sanity
of the testator. the signing of the testator
or their own signing. whatever the subscrib-
ing witnesses may testify it may be contra
dicted on either side.

Real Property - Vol 20

Devises.

It is not indispensable that the witnesses ^{3 Inst}
sh^t have actually seen the testator sign. an acknowledgment ^{Recd 184}
by him to them that the name appearing in the will was ^{3 P.M. 506}
written by himself is sufficient. ^{3 P.M. 553}

In Is a will attested by three witnesses unless ^{2 Inst 455}
they see the testator sign or hear him acknowledge ^{Recd 232 244.1}

But the testator's saying 'this is my will' is not ^{2 Inst 182}
suff evidence of signature. This is not an acknowledgement ^{Inst 73}
ment at all that the testator signed the will.

In c^o proof of hand writing be resorted to in such case?

It is said however that a written declaration ^{Inst 17}
in the hand writing of the deviser that his name was ^{Inst 76.8}
written by himself is suff evidence of the fact of his ^{3 P.M. 254}
signing. This appears to be extremely questionable
How can this hand writing be better evidence
of the signing than, the hand writing of the signature
itself?

The third thing to wh^t the witnesses are to attend ^{3 Inst 156.}
is the publication this is a ^{com:} law requisite ^{Inst 80.1}
the act of publication of a will or devise is
tantamount to a delivery of a deed.

By the publication of a will is meant ^{Inst 81}
some declaration or some act of the testator
amounting to a declaration that the instrument
is his will but there is no established form
of publication but any act or declaration by
the testator importing an intent in the testator to dispose
of his estate (by test instrument) is suff

and hence delivery of the instrument as a deed ^{Recd 40.117}
to a depository is considered as a construction ^{Inst 6}
publication. & it was even held that this
was so when the witnesses were deceived with respect
to the character of the writer by the delivery.

Divides(187)
In C. 182. 6

The declaration 'this is my last will' is clearly a sufficient publication & this is the usual form - And a publication may be inferred as where the form of attestation is in the testator's hand writing to the effect 'signed & published in the presence of these witnesses' 4 Burn 114 and this expression "take notice"

Copy 2381

Sect. 664

~~however, if the will is~~
~~published before the will is~~
~~signed, the witness may~~
~~not witness the signature,~~
~~unless the witness has~~
~~been present at the~~
~~publication.~~

But the publication whatever it is must be in the presence of three witnesses this being point has never been adjudged but it has been decided that a re-publication must be in the presence of three witnesses. They are not attesting witnesses unless they hear or see what amounts to a publication

It is necessary to the validity of a devise 1 Eq. ca 403 that the whole instrument be present at the 3 Moll 263. attestation of the witnesses. they are to attest the devise but if half of it is present & half in another place they attest only half of the devise.

3 Ban 1772

1 Bl & R 46722

454.

Sect. 67. 8.

But unless there is positive proof that the whole will was not present the jury may presume that the whole was present for whether the will was or was not present is a matter of fact for the jury to determine from the circumstances of the case -

3 Ban 1775

2 Bl 577

1 Ban 545.

Sect. 185.

270.

6437

Sect. 89. 101

108. 682.

It is held that if a devise is made on three sheets of paper & each witness subscribes one of the sheets this is sufficient even tho' the sheets are unconnected. This rule supposes the whole will to be present when each of the witnesses subscribe at several & it is not material in what part of the devise the names of the witnesses are subscribed

(14)

Witnesses must subscribe in the presence of the testator
Mr. Pow says that if the several parts of a will are unconnected & wrapped in a blank cover Dow 40 682.3 the subscribing the names of the witnesses on that blank cover is a sufficient attestation of the devise. But this rule is very questionable. - The wrapper may have been opened & an entirely new will substituted.

The 1st requires that the witnesses subscribe in the presence of the testator. These words are in construction synonymous with "within his possible view". If then the testator is where he might have possibly seen the witnesses subscribe this is held sufficient, thus if the testator is in a bed with the curtains drawn & the witness subscribe in the room where by putting aside the curtains he might have seen them this satisfies the rule. So also where the testator was in a carriage near the door of an attorney's office & the witnesses subscribed the will in the office & it was shown that the testator might have been seen from the carriage.

This provision is intended not only to prevent fraud by the substitution of a false instrument but to prevent any mistake as where a testator has provided several wills.

But the subscription of the witnesses tho' in a contiguous apartment yet in such a situation that they could not be seen by the testator this is not sufficient not even if they retire to the other apartment by the express direction of the testator.

2 Bl 877	
Salb 399 395	
686.	
Baith 81	
Pow 90	
1 Eq. ca 403	
Dou 232	
2 Bl 877	
1 Br bk 99	
690.	
Pow 92	

Baith 79	
6am 6 176	
Holt 222	
1 D N. 239	
Dou 232	
2 Bl 377	
Pow 98	

(20)

Devises.

Dougl 229 And this requisite requires a mental
or 241 presence if therefore he is in an insensible
state during the attestation the devise is
not good even tho' it was signed by him
2. 8. 377. 6. n. while he was in sound mind

1491111740

Dowt. 95

It is clear from these rules that tho'
the subscription by the witnesses were done in the
room where the testator is yet if done in a clandestine
manner the subscription will not be good —

Comy R 531

Stra 1109

Bull N 9264

Dowt 45:4.

The fact that the attestation was
in the testator's presence need not appear
on the face of the instrument tho' this
is the usual form. & tho' this is stated
in the instrument yet it must be
established as a matter of fact either
by direct proof or presumption. This is
in its nature an extrinsic fact,

If the witnesses are all dead the fact of
the subscription is suff presumption evidence that it
was in the presence of the English stat this attestation
must be subscribed by three or more
Gaith 35 credible witnesses in the construction
Comb 174 of this part it has been determined that
Dowt 100:10 if a devise is made & subscribed by two
650. 682 witnesses & a codicil made attested by
3. 8. 263 two yet this is not a suff attestation to pass
recim 2270 real estate either by the codicil or the first devise
Dowt 742

Again if an original devise is not duly witnessed by three a codicil duly attested 212m 547
with three witnesses. the original devise is Pont. 680.2
not made good by the subscription to the Comy & 384
codicil & yet if two devises are made at diffe 1 Burr 454.55
times as to several distinct parts of the testator's propy Don 105.7.036
& not attested until the whole is completed the two
parts will be considered one will & the attestation of the latter
will give validity to the former. The reason to take to be this a codicil is
made to affect an instrument already complete
and not to consummate or give validity to the
original instrument. if it is made for this
purpose it is no codicil but a part of the
original devise.

But where there is a codicil on the same Comy & 2197
sheet or paper with the devise - the question whether the subscription Pont. 106.
was intended for one or for both is a question
of fact for the jury.

And the question whether a subseq^t writing 1 Burr 584.5
is a codicil or a part of the original devise 212m 547
thus decided. If the subseq^t writing disposes
only of personal estate & is attested by three
witnesses the subseq^t writing is considered as a
part of the original devise & not a codicil
for it was considered as a codicil the attestation
& three witnesses was unnecessary. & therefore the
subscription by three witnesses is a proof that the
testator intended the writing for a part of the
original devise & not a codicil. If the subseq^t
writing disposed of real property the presumption
will be that the attestation was not intended
for the former writing.

Devised It is not indispensable that the witnesses
 3 Jun 1775 subscribe in the presence of each other or at
 2 term 429 the same time. so they must all subscribe
 free in chancery in the presence of the testator.

2 att 177

1777-741 - But it is altogether the most safe mode
 17 Oct 184 for them to subscribe in each other's presence
 18 Oct 1865 for unless they do one of the witnesses cannot
 4 Jun 1824 testify to the subscription of the others

Buller 264

Poole 705. Now in a question of title at law
 one witness is suff if he can testify that
 the others subscribed in the presence of the
 testator.

A will cannot be formally proved
 in chancery unless all the witnesses are
 present if living (post)

The English st requires that the
 17 Jun 1778 witnesses be 'credible' but this word
 17 Oct 1833 appears to be unnecessary & is omitted
 in our statute. for if it means 'competent'
 it is surely unnecessary for a man is not a witness
 unless he is a competent witness. if it means
 'intitled' to credit it is wholly nugatory for if
 upon trial it appears that one of the witnesses
 was not entitled to credit yet upon the
 testimony of the other two the devise may
 be adjudged good. If the word credible
 has any meaning it means I think 'credible
 at the time of examination'

"Credible,"

It has been decided that a devisee in the devise Divised,
is not such a witness as the statute requires, at least it is not so as to the will ^{as} given to said 574
himself. & as to that the devise is void unless ^{as} Ldlay § 505
there are three witnesses besides him but as to 12, mod 17
the rest of the will you can be be a witness? see below Don 5114-16

and doubtless a person legally infamous is not competent to attest a devis. And if he ^{Port. 16. 136} subscribes his name as a witness the will is precisely ^{St. 16. 136} the same as tho' he ~~had~~ not subscribed the instrument. ^{2d. Lening's Court}

Globe ut supra

But assuming that one of the witnesses is a devisee & that for that reason he is incompetent to testify to any part of the will, will a release given by him of all claim under the will qualify him to testify in support of the other parts of the will. This was one of the greatest questions ever argued in Weston Hall.— It was held & decided by See

Hall. — It was held ^{the device is not sufficiently} ~~obligatory by law~~ by See chf justice that it would ~~not~~ ^{not} Stra 1253
Point 116. 119. ⁶ ^{Winnipeg, St. Crowsing, 1888}

The same doctrine was held in the Poulter
case Hilliard & Jennings Comyn &c q1. (Ves 503) 1d Ray 505
But this opinion was also delivered obiter (Ves 503) 6aith

But the question was decided in 1 Ben 4114
favour of the devisee in such case. & this appears Pow² 124.120.
is & to be the correct opinion. - It is an universal Burrow 427.8
rule that a release renders a witness once interested 1 Vic 503
a competent witness. - Their bias is removed when 2 Vic 374
they testify. 1 Day 41 note Pow² 136.

In 1 Day 41 note may be found the opinion of Lord
Bamden who held that a devisee or legatee can
not become competent to testify in support of a
devise under which they claim a legacy &c. & that even if
they release all claims under it that they are still unqualified

Devises.

"credible"

Our superior court have decided that the rest of the will in such case would be good but this judge was reversed in the Senate who was then the supreme b' of minors. this case is not reported (Wadsworth & Lamp).

at legatee or devise on the other hand whether Devise
 he is a subscriber witness or not is always a Suit 61
a good witness of the devise Pon 235

when Ex' or in a will having no beneficial interest Dyer 184.
 is a competent witness, where not a party 1 Mod 107 Gilb Evans Esp 2419.
 East 113. when a legatee is always a competent witness 1 Ban 427
 where it is indifferent to him whether the will stands Pon 235
 or not. & if there are two wills in each of which
 he has the same legacy. He is competent to testify
 in favour of that of which he is subscribing witness.

Where there is a disposition of real & personal
 property in the same instrument if it is not Batch 514
 executed according to the stat of friends 2 Vols 7200.
 (the void as to the real estate yet it ^{may be} 319. 327. 332
 good as to the personal property. 337.
Pon 218. —
Ita 155.

'Who may devise?'

The rule seems to be that all persons who
 are able to convey at common law real estate
 by deed & who are not disqualified by the
 express words of the statute, may devise.

The words of the statute are 'all persons'
 may devise

But this includes only natural persons Pon 239
 & not bodies corporate, or aggregate or sole 1 Roll 608
 corporations — An aggregate corporation never
 dies

And as to natural persons there are four Dyer 354.6
 exceptions & these are expressly excepted in the 1 Vols 300
 explanatory stat of 34 Hen 8th they are the following Pon 2140.2
 Infancy, idiocy, non sane memory & corpore
 but on the construction of 32 & 8 the rule is?
 have been the same on common law principles.

Who may devise?

It has been held that a person deaf dumb & blind can not devise, for such persons were considered as wanting understanding -

Codit 42 & 1 Bl 304 At this day I presume that a person deaf blind & dumb could devise if it could be shown that such person has sufft intelligence tho' the presumption must still be that they are disqualifid -

6.6.23 It is not suffice then that a testator can remember common events he must have a disposing memory whl means understanding enough to make a rational disposition of his estate.

By an idiot is meant who from his birth never had any understanding. One who in common parlance is called a natural fool

By a lunatic is meant one who has lost his understanding by some supervenient cause -

6.6.236 What is a sane or disposing memory or mind is for the common law to decide but whether such mind exist in a particular case is a mere question of fact for the jury

Hob 225 With regard to coverts it is in gen'l supposed that her acts are done by the coercion of the husband. but this is not the sole ground of her disqualification. the rule is rather founded on their legal union & the policy of the law
Dyer 354 And it has been held in Eng^t that
Hb. 61 a local custom that a feme covert may devise
Codit 116 is void as being unreasonable.
Codit 146
"Husband & wife"
Ind 147.8

In this state it was decided in the case of Devises. Adams & Kellog that a feme covert might devise her 1615 real estate. But this was afterwards overruled 2 Day 163 but now by & feme covert are enabled to devise real estate but this is peculiar to this state. But here she cannot by her devise deprive the husband of his courtesy where he is entitled to it. for the act of devising is merely placing another person in the place of the heiress at law. And in a similar case the wife is therefore entitled to dower.

Where a husband is banished for life 21 Geo 104 the wife remaining in the Kingdom may make Pow^r 148:9 a valid devise.

And even in Engl^t there are modes in wh^t a feme covert may procure the same power over her estate as if she were sole. In such cases however her act is in the nature of a declaration of trust or appointment. She acts in legal theory in such case as an agent executing an authority. Her act is in neither case in law a dispossessing act.

1. By way of trust see 'Hus & wife'

2. By way of power over a user

1st thus if a woman while sole conveys her estate to trustees in trust for herself & her wards for such persons as she shall by her will appoint. See 'by a writing act^t from a wife' 3 Atk 707 make 2 Eq. ca 157 an appointment wh^t give the estate to the appointees. The same thing may be done by Pow^r or Power a settlement made during coverture by fine &c. 50

(28) Who may devise?

Devises.

But it must be kept continually in mind that the conveyance to trustees is the disposing act & the naming the person, is merely executing a naked authority. wh^t a feme covert may always do if of full age. But the execution of this power must be according to the Statute of Frauds.

3 Atk 697 & feme covert while an infant cannot however execute such a power. for the execution of such a power implies discretion. & an infant can only execute a strict power. but a feme covert may exercise a power wh^t involves the use of discretion -

Payn 334 Restraint deasib. & menace of imprisonment
Pon 170. disqualify any one from making a valid devise
Dyer 143.6 And indeed any coercion - This is the common law rule. It is said by Mr. Pon^t that this rule is implied from the words in the stat at his free will & pleasure but with such words in the stat the devise would be void on common law principles.

2d 107 And it has been held that when a sick man was induced by excessive importunity 1 Ch 166. that he might obtain leave to make a Contra^d will that such will was void. But this dev. looks like a vague rule. & if a will can ever be set aside for this cause it must be a very clear & very strong one. This certainly w^t not make a deed void. Nothing less than legal ~~coercion~~.

Holt 46 If either of these disabilities exists at Pon 172.3 the inception of the devise or at its 11 Mod 157 execution & publication. that the disability was removed before his death is no reason Raym 84 for considering the devise good.

If then a feme covert devises her estate & afterwards her husband dies & then she dies the will will not be good. For the consummation is founded on the inception. Com. 84 Pow. 672:3

A joint tenant cannot devise land held in jt tenancy the right of the survivor is paramount. Pk. 500 Ltt. 5287 Eq. ca 172 Pow. 674-6 Co Ltt. 185(4)

This was the rule in Engl^d where the custom of devising was in existence before the Stat Henry 8th & the Stat of Wills excludes jt tenants.

14. There can not be a jt devise made by two persons comp. 269. whether they own jointly a severally. no

And if a jt tenant makes a devise of his part & survives his companion & then dies the devise being void ab initio can never become good for from the moment the jt tenant died he became seized in severalty. 1 Bl. C. 476 3 Barr 1488 Ltt. 631 Pk. 672 Eq. ca 172 Pk. 500

I do not know in this state that there is any objection to a joint devise on principle where those who make the joint devise are jt tenants. They can make a jt deed they can't in Engl^d make a joint devise on acct of the survivorship but this is no objection in this state where the nos accrescendi does not exist.

45. It is a general principle that a man cannot devise real property wh^t he has not at the time of execution & publication of the devise. If therefore a testator desirous to say "all his lands" & tomorrow purchases other land the latter will not pass Pow. 673, 198. So if the words had been "all the lands of wh^t I shall die."

(1446) Who may Devise?

Devised.

intended to enable a person to devin he must either have a present interest or a present possibility coupled with an interest. & it is a general rule that one cannot give by devin what he could not dispose of by test & even livery of seisin is dispensed with only from necessity.

1. 1892.575 But this rule does not hold as to
3. 1892.169 chattel with as lease for years it holds only
1. 1892.237 as to real property. If then a man shd.
1. 1892.119 desire thus I give all my leases for years of
1. 1892.175. whl. I shall die possessed this will carry a
lease purchased after the gift. for a man
is continually changing his personal property
& leases for years follow the rule concerning
personal property.

1. 1892.748 It is also necessary to a devise of real⁽⁴⁶⁾
1. 1892.616 property that the devisee be seized of
1. 1892.518. it. the reason is that the devisee is
1. 1892.566. 611.183 consummated at the testator's death if then
1. 1892.217 the owner of land devines it & is then
1. 1892.566. 611.183 seized & continues so until his death
the devise is void. for at the time of his
death his right to the land is a chose
in action. vide 8 q. n. 151.

1. 1892.174 But it seems that when a man is disengaged
1. 1892.778 by fraud or purpose to defeat the devise the
1. 1892.611. devise will in equity will be enforced under
the jurisdiction of that to be seized as fraud.
If therefore the heir disengages the ancestor
not before the death of the ancestor for
the purpose of defeating the Devise the
Devise will be adjudged good the disengagement
notwithstanding.

Who may devise? (§ 940)

But if the owner is despoiled after devising Devised.
and enters & dies seized the devise is good Sal 238
for by the law of relation the owner is Holt 748
deemed to have been seized during the whole time Palmer 205
time & it is upon this same principle that 1160 51-448
a person ousted may recover for the same Don 285.6.
profits from the despoilment during the despoilment
There is indeed in this case no necessity
for applying this doctrine for the case is
not within the rule that he must be seized at the making
& death - If the owner is despoiled at the time of Sal 238
making the devise but afterwards enters & 28ac 52.
dies seized the devise is good. The devise w^t Sal 238.8.
be paid were it not for the fiction of Don 285.6.
relation for he is supposed to have despoiled
been seized (on his reentry) at the time of the
devise

¶ 1. If one makes a devise of land specifically Holt 251.3
all he does not at the time own but afterwards 243.
purchases the same land the devise as to that Howd 344
land is not good. for however clear the intention Don 200.2
may be it cannot be carried into effect in Sal 237
consistency with the rule of law. for it is a Sal 237
common law principle that a person cannot 3 Ban 148
devise what he has no interest in at the time 782 406
either in fact or by fiction of law. the 414 (ergo)
principle in short is this that at common
law real property cannot be transferred without
livery of seignior. but in devises livery of seignior
is dispensed with but still it dispenses with no
more than this and the rule is that a person
can not devise property, wh^t at the time of the
devise he could not have disposed of by deed
& livery of seignior.

(47) Who may devise
on the same principles if a mortgagee devys
the estate mortgaged to him in full simple &
3 Ich 99. afterwards purchases the equity of redemption in the
equity of redemption over and above.

It seems however that in this state a
person may devise land of which he is not
seized at the time of the testator's death
for our Lts have determined that a person
desirous of real estate may transmit his real
estate to his heir notwithstanding the desirous
& as a devise is here facias the same rule
is probably govern in a devise as governs in
the transmission of estate by inheritance.

The rule perhaps is founded on the
construction of our St. The English stat is
all persons having &c - By the Stat of Conn.
"the owner of lands may devise" - Beside in
ct a right of possession is equivalent to
actual possession in England,

3 Day 166

Real Property No 21)

Devised. Who may devise?

✓ A person having an equitable interest in lands
in a claim to them only in equity may still derive 2 P.May 62
the lands themselves. Thus if I make a contract to Recd Ch 320
purchase lands & then make his devise of all his lands 2 P.May 631
or of those particular lands. the devise in equity paper 2 Ver 79
the lands for in equity from the time of this contract P.May 62
the title of the land is in B. for that court considers 207-
as done what ought to be done. The principle in 1 Ves 494
short is this that the vendor is considered as trustee
for B. Now if B diecized by the vendor's remaining
in possession for seizure is not predicable of a mere
equitable interest & besides the possession of the
vendor is not inconsistent with the right of B.-

But in such a case the land w^t not pass under 2 P.May 62
a devise made before the executory agreement P.May 62
was made. for before, B had not even an equit-
able interest in the land

It is indeed said that if the devise were P.May 62
for the payment of debts the rule w^t be diffe but J.S. thinks 2 Ch 6 144.
that there is neither principle or authority for this
dictum.

(49) Things devisable. In the English statute the
words are 'all lands'. The term lands denotes P.May 62
not the interest of the tenant but the 10 Geo 1
subject matter. for all interests are not 36 Ch 6
devisable. but all lands are devisable by (6)
him who has a devisable interest in them 6 Ch 6
o But tenements & heredities not valuable as P.May 62
not devisable as rights of way & franchises 227
for rights of way are regarded as easements & not interests in
lands franchises are personal

(40) Things desirable what interest in them is necessary to
Devise render them desirable?
or are remainders desirable under our statute
for they are not real estate?

Litt 555 ✓ But rents are desirable if the owner has a
36033.b desirable interest as a fee simple rent, for this
603805 is a valuable interest. It seems tho' it is an
80426. incorporeal hereditament.

(50) ~~Ex-Litt 144~~ An annuity in fee simple is also desirable
80429 this differs from a rent in that rent is charged
on land an annuity is charged on the person
of the grantor.

What estates are desirable?

80428.29 Under the English st no other than
2 Ad 374 a fee simple estate is desirable. It is so
expressed in 34 Hen 8th. Chattel interests were
desirable at common law & are therefore still
desirable.

The words of one st appear to include
estates per autre vie. 'see ante'

And the st 80429 makes them desirable
in Engl.

(51) ~~John 104~~ The term fee simple in the English st
80428.05 is used in the most comprehensive sense.
One may under that derive a fee simple
remainder or reversion. See fus tc.

1 H 183. A desirable fee simple not in possession
Civ 271 may be then either a fee simple in reversion
31. 293 a a vested remainder in fee simple or a contingent
405. remainder in fee or an executory devise in fee
80460. simple & each of these may be devised

What estates may be created by Devise? (52)

So also estates subject to a condition of entry Devise may be devised. Thus A conveys to B an estate in 3 Bls 184 for simple or condition that unless B or his heirs ^{he may reenter} Pow^c 233:4 shall pay £1000 to A or his heirs within 25 yrs. B may devise his interest. But A may not devise his interest. 'see ante'

And as estates may be transferred by devise. 3 Rev 2016 so new estates may be created by devise. thus if Pow^c 237:8:41 a tenant in fee devises to B an estate for life for 60 yrs 111 years or in tail & indeed any estate which may 1 Rol 609 be created by deed & one particular estate which 10 6078 can not be created by deed viz an executory devise

- 4) So a tenant in fee simple after having 2 Rev 629:55 created by devise a less estate than his own 84. may create a number of other estates out of 1 Rev 444. his reversion ad infinitum 1 older 285 Pow^c 241.

- 5) Again estates created by devise may be 2 Rev 116:4 absolute or conditional. 348. Pow^c 2445:6.

- 6) An estate merely equitable may be created 2 Bl 375 by devise. that is an owner of an estate may Pow^c 48:236:278. devise land to one for the use of another or to one in trust for another. -

(57)

What may be devised? Authorities.

Devised

Land may be devised to one person to the use of another but since the st^t of uses the use is executed & therefore the legal estate rests in the extinguished use. so there appears to be no advantage in limiting an estate to one for the use of another.

But an estate devised in trust is a very
diff^t thing. A countable estate may then now
be devised to one tho' the modicum of a trust as
a reversion to A & his heirs in trust for B & his heirs
& this to A & his heirs to pay over the profits to B
& his heirs & these two forms produce precisely the
same effect. for in the last case the countable trust
is in B & his heirs. is all as in the first case.

57/

Further a person may devise not only a desirable
interest but a bare authority over an interest thus
734. 344.
Per 359. 240
392.
July 73.
Co 1113.
1807 332.
Per 2784.

one devises that he since have the disposing ordering
int^ting se of his estate. I.e. has the authority but
he has no interest in the land & has no authority
to sell for the word disposing means managing
not disposing of he can make any leases but it will
not affect his executors shall sell his
land or order in his will that his lands shall
be sold by them. they have authority to sell
but in the case above I.e. has not the power
of selling but merely of regulating

Authorities created by devise are of two kinds (Devises,
1st Bare authorities. And authorities coupled Coupl 263
with an interest. Pou 292

II. A Bare authority is a mere Co. 263
power. And is connected with no manner of one's Car 382
interest. It is a mere power of Attorney. tho' Pro 242. 302
not like other powers of being revoked by the death of Coupl 466.
the person who gives the power — 3 East 533

1) And where one desires that his executors shall 6. Sitt 113
sell his lands the lands descend on his death 5 East 533
immediately to the heir liable to be directed Pou 292. 3
when the executors shall sell. If the land is devised
to A & the power to B the estate descents to the devisee, subjectated

And a release of such an authority by the 6. Sitt 446
person empowered is utterly void. as in the case Pou 293. 4
above if the executors shd. release his authority
to the heir. it is utterly void for such an
authority is personal & cannot be transferred
& therefore not released & after such a release
the executors may still sell. & on application
a Ct. of chancery will compel him to sell.

2) And it is an universal rule that such
a power must be strictly performed & 272. 241
therefore the execution of the power must Pou 294
always be construed with reference to the 1 Powr 120
power itself. thus if a devise gives a power to lease land for 20 years if a 2 East 376
makes a lease for 21 yrs this lease is utterly Coupl 267
void 272. 644
1 Wlcs 176

This power is strictly personal it cannot
therefore be transferred unless there is an attempt
to transfer & then the transfer is a part of
the power — It cannot be devised.

Power, (naked)

Devised

Sect 44

Dow^l 294.5

Iyer 177.

Root 67

M & 32Bro^g 26.52

Colitt 113.

Par^l 296.7

Iyer 176.6

219a.

And if a power of this kind is given to two one of whom dies before its execution it never can be executed by the other in case of necessity indeed a ~~b~~^c of equity may appoint another. And on the same principle he cannot devise gl. i.e such a power is not revocable. — If the devise were that either of them might sell. or that the survivor might sell the rule would be otherwise

But if a person devising thus empowers my executors to sell my land & there happens to be three if one dies. the other two may devise. But if there be in such case but two executors the survivor may not sell for the authority is to executors not to an executor. — The words of the power are in one case satisfied in the other not

(63)

If a testator desires that his land shall be sold with naming the persons who shall sell if the proceeds of the sale are to be distributed by the executors they are the persons to sell. And in this case if there are two executors one of whom dies the other may sell for they take the power not as trustees but as executors vertute officii but if the executors were named in the devise the rule at supra is left

Rath 420

Par^l 299

Aver. 304

Par^l 307.

But if it is devised that lands shall be sold & the proceeds of the sale are to go into the hands of others than the executors. he is the person to sell.

Powers coupled with an interest

(63)

If the person thus empowered to sell land refuses to execute the power then who are to receive the proceeds of the sale may compel in chancery the person having the power to sell to make a sale according to the power, & if he dies before a sale the C of Chancery will suffice as trustee. I & thinks this the regular course in the case when where the exec^{utrix} refuses, & to appoint another trustee there is something harsh in compelling a man to accept a power of attorney.

If one devires his estate to A. to be sold this is the devire of an authority coupled with an interest. It is an immediate devire of the land itself. —

As if one devires the profits of his land to A (for the purpose of educating his son) till he shall attain the age of 21. This is a devire of an authority with an interest. for the devire of the profits of land is a devire of the land itself.

In case of an authority coupled with an interest the interest is the principal & the authority the accessory.

In the case of an authority coupled with an interest the devire & his representatives will hold the land till the expiration of the time mentioned in the devire but in the case of a bare authority it ceases with the death of the devire.

2 Leon 221.

3 D. 78.

Par. 302.

Cart. R 1-20

64

Devises

Authority coupled with an interest.

In Excts vs Entlebourn 1.2.2 Day, the question was
whether a devision of the inheritance to A & B was
in accordance with the principle last advanced
& therefore explain a little the principle of the
rule. Suppose A, owns land to B, for the purpose
of educating the son of A, until the son attains
the age of 21. Now if B does it is clear to J.S.
that B's representatives take the estate & must
use the profits to the education of A's son
the sum in that amount to a devise of land to
B subject to a charge viz the expence of educating
the son. The devise has an estate sum oner'd.

Jan 202

Apr 210.

And if in this case the son had died before
attaining the age of 21. still the Devise holds the
land until by computation the son would have
attained to the age of 21. - The authority is
accessory & the interest the principal. If the power
had been a naked authority when the object
failed the auth'ry fail with it.

Aug 260

The appointment by will is no exception of
a power to appoint to appoint by will & executors
for powers must be pursued strictly both as
to the mode as well as in other respects.

66/ 1 Bl 479

Who may take by Devise?

Jan 314

All persons not incapacitated by positive
law may be devisees. But by 34 & 54 & 8 Ed
Devises in matrimony are void but by 43rd
Ediz some exceptions are made. But by 29
Ed 3rd this exception is narrowed so that
Devises to corporations are in gen'l void this
was made on acc't of the influence of the
clergy in obtaining land by devise.

406. 1 Bl 268.

Who may take by devise?

(60)

In this state corporations are not prohibited ^{wife} from taking land by devise by any gen'l law & therefore in gen'l corporations wh^t may purchase or hold real property may take land by devise. unles^p prohibited by their charters

17 Persons taking by devise may be either cur^tton 315 or natural persons. Natural persons capable of taking by devise may be either in esp^t not in esp^t at the time of the testator's death Those in esp^t may of course be devisees unles^p incapacitated by some civil inability

Coverture is no disability to take by devise. The hus^d may however at law defeat Pon 315 a devise to a wife by his dispent for a debt Pon 43.4. always supposes a mutual agent & the dispent of the hus^d is the dispent of the wife but a b^t of eq^t will interfere to prevent the hus^d from any dispent wh^t will injure the wife where the dispent is unreasonable.

And a woman may be devizing to her husband, at law as well as in equity tho' in law she cannot be granted to her husband. The legal union of hus & wife is the reason why the wife Pon 315.6. cannot be granted. But in case of a devise the union is destroyed. Coll 3.0

An alien friend can take as devizor but he can hold only till 'office bound' (as in the case of deeds). When this inquest finds him an alien the title ceases & vests in the crown or state. Pon 316.11. The estate passes therefrom from the heir at law 'Deed 14.' by the devise.

(65)

Who may be devised?

Devisees

An illegitimate child cannot take by devise until he has acquired a name by reputation but having acquired a name by reputation he may take a devise even to the son of A. his son being illegitimate. Park 526. he can not take unless at the testator's death he has acquired the reputation of being the son of A. & this reputation can be acquired only by lapse of time. Nov 35 9.1.75

Sou 6344.5 But if a devise is made to the children of A. he having both legitimate & illegitimate children the whole estate goes to the former. Nov 35 6.1.75 And it seems that the rule is the same where the devise is made by the mother. for it is to be presumed that it is the intention of the testator when he merely says children to give the property to the legitimate children only. Dec 1236. Dece 345.

Nov 6371 But natural persons not in esp. may be devised thus a posthumous child may take act 225 2 Paus 275.5 as well as one born before the testator's death. 2 Paus 320. but distinction now for one is taken between a devise in the present time to an unborn child & a devise to an unborn child in the future & between a present devise to them & a devise to them by way of concurrent.

2 Bl 169 3.5 or 10 & 11 H.7.3. If an estate is limited one for life remainder to his unborn child. 3 Blac 124. a posthumous child, to take ^{during the lifetime of the father} if born in the testator's life-time, or if the particular estate shd. fail before the remainder man is born as the remainder is still good tho' at some law this was not so! the words of the st do not extend to devising the words being by any marriage or other settlement but in construction it is extended to devising

Who may be devisees?

at intention has been taken between an unborn child not in matre by present leg: ca 173 words & in his true words. If the words were future 1. Sct 5. 53 thus a devise to an infant when it should be born 5. 5. 250:1 was held good by way of etiology devise - Frame 429

And in this case also it was held 16 Gen 135.
that if the words were future the child as such take if the words were present the child Straw 1095.
could not take.

A devise to such child as shall have 5. 5. 250:1
living at his death will rest as well in Princ 6. 50.
a posthumous child as such as in one born 2. P.M. 246.
at the testator's death. for here the devise 2 H. 2. 379
is executory, & he is for this purpos deemed living 1. B. 4. 243.

But in Doug's time the question whether Salb 230
a devise to an unborn child by present 2. B. 4. 273:6
words were good was unsettled. So it was Raym 5. 53
agreed that if the word were prospective as a 16 Gen 135:6
son born after the testator's death no take Princ 320. 332.

The ground of this distinction must have been Freeman 244
the intention of the testator. it could not have 2. M. 6. 8. 9
been the federal doctrine of acyclicity (See west page) 1. Wilson 5. 55

Where the devise is per volta de presenti Frame 428-
the devise in terms is not executory & this is
urged as an objection to the devisees taking Douy 476
for if he takes at all he must take by way of Burn 2157
of etiology devise - & this is said to be contrary to 8. 2. 0. 43
testator's intention as manifested by using volta de presenti McGen 225
But I think, that the wight of authority, in Frame 428-
favour of the devise in both of these cases, &
for answer to this objection vide post

(71) Who may take by devise

Devises.

The objection stated to an infant taking who was unborn at the time of the testator's death by present words is that the franchise would be in abeyance but this reason is unsatisfactory for until the child is born the full blood descends to the heir at law of the testator until the child is born and in such a case the heir at law holding title the child is born is not accountable to the devisee for the profits of the estate devised to the unborn child. for in truth the devise does not take until he is born until that event the heir at law owns the estate. & besides this objection applies if true with equal force to every etomy devise.

1 Rec 135

1 Eq:ca 173

2 Rec 300

1 Rec 172

3 All 145

Salk 229:30

At any rate when the devise is in the present tense to a person to be born in future & there are words in the devise which show that the testator knew that the devise was unborn at the time. the unborn child will take as well as if the words were in the future tense. Or the rule is the same if the devise, adverting to facts which afford an inference that the testator knew that the child was unborn at the time of the devise.

Thus. If a son shall be born to J.S. I devise to him or her my estate. the child will take the same after the testator's death for the testator takes notice that the child is not born & this makes the devise executory.

71

Who may be devisees?

I take the rule now to be that every devise
described in the devise devine to an unborn child as such does 4 B&B 271
afford the inference mentioned in the talk 230
last rule & therefore the rule is in 10 Willm 4/86.
the present time the unborn child when Feare 425
born will take. for the intent is clear that 1 Willm 105
the limitation shall take effect in the future both 2 Mod 8/9
such child so that the disposition is intended Poc 336-q.
as executors.

Where the devise is described as unborn
the disposition is necessarily intended as
executors if the child is unborn at the
time of the testator's death.

So also civil persons may be devisees that Poc 336:7
is persons may take under a description of 609.
civil capacity As a devise to the executors
of A. And a devise to the executors of the
executors of B. is good. if the intention is
clear indeed it is a general rule that civil persons
not in esse may be devisees as in the above example
the executors of the executors of C.

The members of a town are not such 1 Roll 614
civil persons as can take under that character Poc 336:609
If then one devise to the parishioners of the
parish of A is void. tho' a devise to the
parish of A may be good. A devise to the
inhabitants of the town of A is void a
devise to the town of A may be good
For no one w^t suppose that a devise would
intend that all the inhabitants shd take as
tenants in common or joint tenants. but as they are
not described in the devise as a corporation they
cannot take as cohereditors

721

Devisee, how described?

Devisee

2 Conn. R. 287.

And a devise to a church ^{meaning the body of communicants} was decided within a few years in Court in that case the devise was to the church of the Baptist church of Granville for the church could not take as a corporation under this description, for the church was not a corporation. but it was not the intention of the testator to give the estate to the individuals of the church. they therefore c^o not take at all — So a devise "to the yearly meeting of people called quakers" was held to be void. (Court 1826)

[7] 178671

Att. 410. 340

707. 405. 337

1 Coll. 37

"Dec 25"

"Prob. 110"

Every devise must be properly designated or he can not take, but this designation may be either by naming him or by describing him or by both & tho' his name is mistaken yet if he is described so that the description will apply to no other he may take. But this will receive some qualification (support upon the admission of parole evidence to explain devise)

For example a devise to the government treasurer or executor of such a state is good. A devise to the son of I.S. is good if I.S. has but one son —

Att. 410

Prob. 335.

70073(4)

post 18

and the description tho' not perfectly applicable may be made good by reputation as in the case of an illegitimate child. So a devise to the wife of A will give an estate to the reputed wife of A tho' not his legal wife

Devisee how described? (73)

But this rule never holds in favour of an Devisee,
illegitimate child born after the devise made by 660.65
for if he takes at all he must take by 660.65
being reputed the son of J. at the time of the bequest 1736
devise, made wh^t reputation he could 1736.52.4
not aequiri until born - Pm^t 338.9

And besides Pow^t says 'the law will not expect
that such should be born, nor will it give liberty
to provide for such before they are in spec' which
is a more satisfactory reason in case the child is
described 'as the first illegitimate child of A.B
(a woman) in wh^t case the description is certain-
t). Hence also a devise to all the natural children 660.65
children of A will not inure to the Pm^t 338.9
child in ventre matris at the time of
making the devise, for this child counts
not have gained by reputation the name
of being the child of A & besides the
possibility is too remote that one will
have a natural child in future and the
policy of the law operates here as strongly
as in the case above.

A woman may take by devise under the Pm^t 340
description of being the wife of J. if she is 86.73.2
reputed to be his wife tho' she is not his lawful
wife. So all that is necessary is to ascertain the
intention of the testator -

(74) Devises how described?

Devises do a devise may be constituted by an
Pn 840.96 incurate or equivocal designation ex gr.
496. under a devise to minors peers of the devisor
Dau 837 a daughter may take if such appears to have
Mod 104.5 been the intent. this irrevocable facie the words
406.32. Anote a son, & a son u? take under this
description to the exclusion of an elder daughter

do a daughter may take under the description
2. 914. proximus sanguinis of the devisor. this the adjective
sanguinis is masculine as if to a son for the adjective
Prima 363 as applied to a female is only a verbal
Eq. ca 213.4 inaccuracy. do the older daughter in the last
2. 36.3.102 even excludes the younger.
Part III'

(75) Pn 844
sh. 17. The word child a children is a soft description
Mod 220. ex gr. "to a for life & afterwards to his children"
his children take a life estate in remainder
descriptio personarum. the word child being
descriptio personis. (see deeds) (also estates)

Real Property (1822)

Desires.

The word children is generally used as a word of description. in which case the person as described take Part 344 as purchasers &c in a last will. So if an estate is divided by 176 to A & his children (he then having 2 children) he & they together take a joint estate as purchasers.

Note or which is the same thing a word of purchase as contradistinguished from words of limitation or inheritance.

Parole evidence is admitted to show whether there are or were not children at the time the devise was made (post).

But if A in the last case has no children at 66 176 the time of making the devise children is a long 304.10 word of limitation denoting the quantity of land Part 505 desired. if the children take a special heir 1 H 8 C 456.60 they cannot take in remainder as purchasers for 1 Bals 214 they are not in ch^t & therefore takes an estate law 1 Vates 227 & they of course as issues in tail per formam 47.29.4 alone Estates.

It should note as a general rule that the testator's intention is to be collected from the state of things existing at the time of making the devise &c &c. So A's wife means her who was his wife at the time of making & publishing the devise & not a subsequent wife who might have been his wife at the time of his death. This rule does not apply where the devise is to the heir or heir male of a person living at the time of the devise &c.

Devises

Point 345.6. The description of a devise may be either gen'l or special. By a gen'l description is meant any one designation of any person who may happen to answer the description & not of any one individual identified at the time of devising.

26.

4.6.33

By 333.b

1st. Rule is if one devises to sl. in tail, remainder to the next sl. male of the devisor in the case he who happens to be next heir male is constituted the devisee in remainder. Same rule if to sl. ut supra remainder to the next heir of the devisor.

Hob 33

By 333.b

Point 345.6.

So a devise may be constituted by a devise to such a "stock" family or house & it will inure to the heir principal of the "house" family.

229. ca 290.

Point 347

If a devise is made to "the postentity of a" his lineal heir if he has any shall take & if he has not & his collateral heir of the whole blood will take

Hob 532.

4.6.32.

Point 347

If a devise is made to "the next of the name of the testator" the next relation of his name whether male or female will take. i.e.

Devise how described? (77)

So a devise may be described by the words Devises
"next of kin to the testator in wh^e was the person 606576
answering that description by the rules for computing 3 East 274
the degrees of kindred will take. in this case thou 3 Brdly 70.234
& thou only will take who answer the description 4 Do 207
under the St of distributions. And the legal compu-
tation of those degrees always relate to the time of
the testator's death. Such being the rule under the St
of distributions 29.6a 2^o

And if a particular estate to another is inter-
posed still the words next of kin are construed to
include thou and thou only who answer the
description at the time of the testator's death. those
words are construed as they are in the St.

To the words "nearest & relation of my name" is 1 Volsy 335
a good description but in this case the word 1m 347 407
relation is noncum collectivum & includes all
the testator's nearest relations in the degree mentioned
Ex gr. All his brothers & sisters of the same name
if he has no neare relations (his sisters if married
& of diff names w^o be excluded in this case)

78
Devised

bns E 532.76

Prnt 352.3

Ld H's

1720 838.

Devise how described? Civil Description

Where one devisee lands to 'the next of his name'
It has been a question how far a daughter who
who by marriage has changed her name can
take? According to some this is the distinction
If she is unmarried at the time of the devise
and also at the testator's death she may take
the manumitted at the time when the question
arises. Scarr if married at the time of the
devise or at the testator's death

But Dr. Hardwicke seems to think that if the
devise is immediate or by way of vested remainder
it is sufft if she is unmarried at the time when
the devise was made. If limited on a contingency
that her name at the time the contingency
happens decides her right this opinion seems
reasonable & conformable to the civil rules.

If the testator explains who he means by nearest
of kin or nearest relations persons not falling
under the description "nearest to" may take ex grā
to my nearest relations the Stiles & Brookes had
the latter tho' they be not so near as the former
shall take with them.-

If one devises to his nearest relations, his wife is not Devised.
such takes no part, for tho' she w^o be entitled to Wives 34
a part under the St yet she is not a wife has 30th 759:61
relation is not related by consanguinity not of Dom 350:1
him. the words therefore exclude the wife

If one bequeaths personal property thus (to my near
est relations) then relations who w^o take as such
under the St of Bequest distributions are the
legatees so it seems if the words were "my relations"
So if the words were "my nearest relations"
according to the St of Distributions & then words
w^o exclude the wife -

But parol evidence may limit the words (part)
But if devises of lands are thus described & whether
the above rule w^o hold or whether the devise w^o
not be void by reason of its uncertainty?

In Conn & in the other states the St w^o ascertain
the devisees in the last case as well as in the first
for the Conn St regulates the succession as well to
the real as to the personal estate of the testate

Devised. It is a general rule of construction founded on
 1. *13 Eliz. 5.55* feudal principles that if an estate of freehold
 2. *8 Eliz. 2.42* is devised to one with an immediate or intermediate
 2. *23 Eliz. 6.41* remainder to "his heirs" or "heirs of his body" or "his
 16. *99* open" he takes an inheritance in the first case
Silbury 3.72 a fee simple & in the two latter an inheritance in
 2. *Will. 3.23* fee tail. If then tails is devised to A for
 1. *Richm. 38* life remainder to the heirs of A. A takes a fee
 4. *1 Eliz. 2.46* simple. If an estate is limited to A for life
 5. *13 Eliz. 2.94. 3.88* remainder to B for life remainder to the
 6. *2 Eliz. 3.6* heirs of the body of A. A takes an estate tail
 7. *1 Eliz. 5.03* liable to be interrupted by the intermediate
 3. *2 Eliz. 4.37* estate of B.

The reason of this rule is that the words heirs are considered as words of limitation & not of description.

In this state this rule is abrogated by
 express statute.

Bro. 2.40 In England however this rule is qualified by
6. 6 Eliz. 6.6 state decisions, for it must be confessed that
1. 1h. 224 it is the intention of the testator to give A
4. 1 Sam. 2.79 only a life estate & to use the words heir
1. 2. 16. 4 as words of description & where from the
 "Power of Chn" face of the devise it appears that this was
 the intention of the testator it will be carried
 into effect.

(81)

Thus an estate to a for life remainder to Devisees.
his heir for life here the word heir is plainly ^{Part 358.4} used as a word of description & it takes an estate for life.

So where there is a devise to a for life ^{Act 358.4} Bro 640
to his eldest issue male a takes only an estate ^{660.17.6} Pon 359
for life.

So where the devise is to a for life remainder ^{Act 358.3} to his issue & to their heirs forever, here since ^{Act 358.4} Part 224
of limitation is added to the word issue it is Pon 359
clear that the word issue is used as a word of
purchase. & therefore it takes only a life estate.

And indeed the word issue in its proper ^{Act 358.1} Stra 701
sense is a word of description tho' it is in gen'l ^{Bro 640}
in Devises construed as a word of limitation by ^{HTR 244}
reason of the supposed intention of the testator ^{Pon 360}
but still where the intention is clear to use it
as a word of description it will be so construed.

So "to a for life remainder to his eldest ^{Act 358.40}
issue male" it takes an estate for life tho' this ^{660.17.6} Pon 359
is a case of some doubt. Had the words been ^{Act 358.41} Pon 359
'eldest heir male' & w^t have taken a fee, ^{660.17.7} Pon 359
^{Act 358.3}

2) Special description

By which is meant the description of
some one person in particular & not as in ^{1 Reg. 2114} 1 Ventr 334
the ^{new} for ^{now} a description of any person who ^{1 Ventr 334}
may happen to answer the description. ^{2 D. 311}

Thus a Devise to the eldest son of J. S. when Rayn^d 330
jd shall die is a gen'l description but a ^{3 Decr 632}
devise to the eldest son, or the heir male ^{2 Ventr 660}
of the body of a now living, is a special ^{Pon 365}
description meaning him who is now heir
apparent of a.

(13)

Special description of Devisee,

Devises,

1. 193

2. 367.5

3. 223.

It is laid down as a general rule that the devise must answer in all respects the description given of him. but this is by no means universal. If a devise is made to "the heir of B" & B is attainted of felony, B can have no heir & therefore no one can take under the devise but if the devise was to the heir of B, in this case it would take.

(14)

1. 2. 190.70
2. 160.66.
3. Cy 98
4. 369.

If a devise is made to "the heir of B" & the testator dies in life of B, the heir at law of B cannot take, for the description is general and means him who shall be the heir of B at the death of the testator & the will must take effect on the death of the testator or not at all, but on the death of the testator it cannot be ascertained who will be the heir of B. There is no such person existing as answers the description,

Where one is described as a particular heir if it appears that a person not heir general was intended to take under the devise such as Ray 2185 a person may take ex. s. n. where a man died 1646 devised thus to my heir who is my brother 447 404.5 a B. here A. B took tho' he was not heir to the testator. It is apparent then that if a special description is added to the word heir the person specially described will take tho' not heir

(85)

Special description off Devise,

And where the intention is clear from the Devise,
will one may take under the description of 23.2.1010.
him in the life time of the ancestor. Thus "I 10 M 1229
the heirs male of the body of a' & by the same 3 M 6.376.8
instrument given to a a legacy the person 1. B. 26.483
answering the description of heirs of the body
of a will take. for here it is clear that the
a is living at the time of the testator's death
yet that the testator intended him apparent
since he has given a legacy to the father of
the heir, by whch he showed that he knew the father
to be living.—

For the intention of the testator shall by 5.4.
generally provided that succession is not repugnant Long 337.4
to the principles of law. & this rule is peculiar ante 4.
to all others. But the intention of the testator
cannot create limitations & estates whch the law
does not admit.

61 And a person in no degree answering the
description of heir may take under words Hob 75.34
importing to constitute him an heir as Nov 48.
where one devised thus I will that my wife Son. 9.395.8
shall be my sole heir. the wife took the Peter 308.
whole estate. so I will that I shall be ^{1. B. 26.483} the sole heir to all my property. If I take
the whole estate. I am bound to make good for my

Special description of DevisesDevises

It is after all a gen^t rule that if the
 17 Ch 335 description is so far certain that the person
 16 & 57 b. intended to take as devise can be ascertained
 1 Hob 32 that the devise shall not be void for uncertainty
 6 & 106. or trifling inaccuracy. Or in other words.
 1 Plowd 344 a A devise is never to be construed void
 523. for uncertainty - unless from incapacity.
 1 Powl 348:4

403:19

1 Colitt 3a And therefore a devise to Margaret the
 17 Queen 293 eldest daughter of J.S. the p'ss eldest daughter's
 1 Powl 405:7 Margary. Margary the eldest daughter will
 take. But if J.S had had a younger daughter
 named Margaret Lazar (see post)

10 Mod 371 And if one devizes to the wife of J.S. &
 1 Plowd 344 if she dies & the wife marries another person
 1 Powl 405:6 & R. & then the testator dies, all v.s. & R will
 1 ante 761 take under the description of wife of J.S. for
 the rule is unto that a devise is to be construed
 with reference to the state of things at the time
 of making the will.

Recibd 175 And when a man in his last illness
 175 devized to a posthumous child wht was
 1 Powl 406. then expected & in fact the child was born
 before his death. yet it was held that the
 the child was a posthumous child wchew
 the meaning of the will.

When a Devise may fail of taking effect? (87)

If on the other hand the description given ^{of} Devises to a devise is not only inaccurate but false ^{or} incorrect, the devise can not take. Thus if one devises Pow. 407
huc to the heir of A. & J. is an alien the devise
will be void, for as no alien can have an heir
this is not an imperfect description but a false one.
But if he who claims under the devise be proved to be the up-to-heir, see Pow. 408.

✓ How a devise may fail of taking effect.
1st from inherent defects. 2nd from some extrinsic Pow. 409
cause, or from matter which the will.

If then there is an uncertainty or repugnancy
which cannot be cleared up in the words used
as to thing devised, or the quantity of trust
intended, &c. The devise must be void. These
are called patent ambiguity. Under the
same head fall limitations contrary to the
law, or policy of the law, as if one limits
an estate in perpetuity, &c.

Extrinsic causes are those which arise from
facts not appearing on the face of instrument Pow. 410
here the uncertainty is called a latent
ambiguity, as where the doubt is to whom
of several persons or what of several things
is intended by the description —

✓ As to patent defects if there is on the face of Pow. 411
a devise an uncertainty which cannot be explained
or a repugnancy which cannot be reconciled the
devise is void at least as to that part & such
an uncertainty or repugnancy may exist in
several particulars, as with respect to the subject
matter, the test, the person of the devisee &c.

Devises.

Ambiguity

Thus if one devises a house with the appurtenancy the construction will be that only the house with that which is absolutely necessary to the enjoyment thereof shall pass for the word appurtenance is too uncertain to pass any more than that.
 1 P.M. 600. 2 T.R. 498.

And where the ambiguity thus arises on the face of instrument the gen'le rule is that it cannot be aided or explained by parol evidence for the law requires that a devise shall be written & if parol evidence shd be admitted this statute w^t be evaded. Besides it is a gen'le rule of the common law that latent ambiguities in an instrument shall never be explained by parol evidence.

3 East 172 If the person described by the devise as devisee is on the face of the instrument so uncertain that the devise cannot be ascertained with certainty ^{or void} the devise passes to one of the sons of A. he having several sons. Thus also twenty of the poorest of my relations. for these persons are unknown & therefore no certain intention can be collected from the words of the devise as to the devisees.
 106 57.6 But a devise is never to be construed void from uncertainty unless from neglect,
 406 32. Bro E 106. 2 La Ray 1312.

560 65.6 As to latent ambiguities if from extrinsic facts the person of the devise is rendered absolutely uncertain the devise is void. Thus all my real estate to my son. when he has several sons it is prima facie void. Thus also a devise to a B. when there are two persons of that name the devise is prima facie void. - The meaning of this rule is that the devise must be void if there is no proof aliaminde to prove which son or wife a B is intended.

Thus parole evidence is admitted to prove latent (Devices.)
ambiguities, for here the uncertainty is created
by parole evidence & therefore may be explained
by parole. There is no ambiguity on the face of
the instrument.

✓ So also if from extrinsic circumstances it is un possible
certain what subject matter is intended, as here
the uncertainty is from parole evidence it may
be explained. Thus a devise to S of my manor of C
when I have two manors of R. parole evidence is admitted

- 72) It is said however that if the devise is Pr 425
thus I give to S one of my manors of R where Bacon's Rule 100
the testator has two manors of R. the devise may
elect all of the two manors, he will take.
But where the devises are in alternatives as to
one of the sons of J.S. here the will is void for uncer-
tainty unless parole evidence is adduced to, for here
there can be no election, for who shall elect?

✓ And devises may fail because the testator's 3 T.R. 445.6
intention is contrary to the rules of law, however Pr 431.26
clear the intention may be, as when the Salb 234,
testator limits a remainder on a contingency Bull 263,
too remote

Or when he limits an appurtenance on a contingent
too remote in point of time. They to A in
fee & if he dies witth heir to B.

In these cases the ambiguity is latent.
for the construction of the words is sheer matter of
law, and if the construction makes the limitation
contrary to law, this arises entirely from the face of
the instrument.

(92) How a Devise may fail of taking effect?

Devises If in the draft of the instrument the testator's instructions are not followed (Mon 356. & this is a fact which can be proved by. Pow 426-7) & this is a fact which can be proved by. part of the devise will be void, for the Devise is not his act in law. This supposes that the Testator did not ~~not~~ know that his instructions were departed from. But the last rule is to be taken with 1 Rec 113. this qualification viz if that part of the D. u 427 instrument which was contrary to the intention of the testator can be separated from the part which is agreeable to it. the former is void & the latter is good. This where a testator directs an absolute ~~devise~~ in fee to his wife and the survivor of his own motion insert a condition this condition (if unknown to the testator) will be void & the devise abrogate.

426-27 Again a devise may fail of taking effect
2 427-57 because if separated in it w^t effect no man Pow 427-8 than the law w^t effect will be. Thus 2 Barr 880. if one devises to his heir at law the same 2 6. 57 estate which he w^t have taken without such Compt 420. devise the heir takes not as devise but as 1 222 187 heir by descent. by estate here is not meant 1 091 m 397 land but "quantity of interest".

2 Do 135

1 26 89 ~

1 091 m 430-5

2 26 378

1 091 m 355

430. 438.

1 091 m 348.

This rule stands on two reasons first that the lord may not be defrauded of the fees due on the event of every descent. Second that the Devisor's creditors may not be exonerated of their debts for before the testator's bankruptcy it was held that the Devisor was not liable for the debts of the Devisor.

How a devise may fail of taking effect. (93)

Now there reasons have caused. the rule however Devises
is of much consequence. for if an heir at law 2 Edw 220.2
takes as heir the rule of descent is very diff'rent. Poit⁶ 135.6.
from what w^e have been the rule has been taken 2 Ker 127
by devise is by purchase.

In this st the rule is to most purposed
not important. for it was always held here
that the land in the hands of the devisee is liable
for the debts of the devisee & the line of descent
is the same whether the heir at law took as
devisee or heir. There is one consequence even
here of this distinction on acc^t of wh^{ch} the rule ought
to be continued. I refer to the case of a
posthumous child. For if I^s has children
living at his death & dies intestate & a posthumous
child is born. the posthumous son takes with the others.
But if a devise to the other children any good heir^w be excluded.

Again if one devises to his heir by way of Stradv. 11
remainder. what the heir w^e have taken as a 2 Hen 4.101
reversion has the devisee died intestate. the heir 234
will take 1st reversion as heir and not as devisee. 13 Nov 123.
for the estate is the same in both cases - a fee 2d day 1508
simple - 3. Dec 127.
1 Rul 626.

And if an ancestor devises an estate for life 3 Edw 26
only to his heir at law & makes no further Poit⁶ 431.2
disposition of the f¹ simple. the devise is
void. for the estate is the quantity of
trust which he w^e take by devise & by his
ship is the same & therefore according to
the gen'l rule he shall be in by descent.

(95)

Devises

How a Devise may fail of taking effect,

But if an estate for life had been devised to the heir at law & remainder to a stranger here the heir takes the estate by purchase for this is a diff^e estate from that wh^t he w^t have had by descent -

Bro E 833

919.

Com. 872

Lic. 2411

Stra 1270

1 Bl R 22.

1 Edw^r 2718

And when a testator devises a f^d simple to his heir at law charged with the pay^t of debts or legacies the rule is the same that is the heir does not take by devise for the quantity of interest is the same as he w^t take by descent - charged with burdens indeed but this makes no difference

1. on 6161.

2 Mod 286.

Comy 272

Lack 242

Bro E 53. 919

1 Freeman 238.

Pon. 433:4

2 Bl 206

Don t 438:9

And if a testator devises his f^d simple to his heir at law by way of condition still the prevailing opinion is that the heir takes by descent.

Thus I devise my real estate to my trust son & his heirs forever on condition however that unless he pays I.S. \$100 the estate shall go over.

This effect results from keeping up this distinction that if a devise is made to the heir at law wh^t comes with in any of these rules making the heir take by descent viz that in case a daughter is the heir at law and a posthumous child is born & that child is a son as the devise is void the daughter takes by descent & therefore the birth of the son takes the estate from the daughter & vests it in the son & if the posthumous child is a daughter half the estate of the elder daughter is taken from her & vested in the posthumous daughter -

How a Devise may fail of taking effect. (96)

Again an alteration in the devise of the Devises time at wh^t the heir shall receive the estate ^{Par. 230-1} the quantity of wht. being the same, does not ^{434. 39.} enable the heir to take as devised. thus if the testator ^{Par. 234. 72} devises a life estate to J. S. remainder to his heir at law. this devise to the heir at law is void & the heir shall take the estate after the life estate of J. S as a reversion by descent

77) But where a limitation to the devisees ^{Bro. 431} heir produces an alteration in the course of ^{34 Ver. 127. 8.} descent. i.e. where the devise makes a stiff limitation of the ^{1 Ver. 112. 3.} estate from that which takes place by descent. the heir takes by purchase ^{Par. 439.}

Thus if the testator devises land to his two daughters who are his heirs they take as devisees. because the devise makes them joint tenants whereas if they took by descent they w^t be coparceners. & the case w^t have been the same had the daughters been devised to take as joint tenants in common. Indeed in these cases the estate is diff^r from that wh^t they w^t take by descent.

So also if one having two daughters who are ^{6. 2. 117. 6} his heir at law devises the whole of his ^{Salk. 142} real estate to one of them she takes the ^{3. Ray. 329} whole by devise & not one half by devise ^{Comyns. 2. 123} & one half by descent. for if she took ^{Par. 244.} one half by descent her sister w^t be entitled to a moiety of the half wh^t is evidently contrary to the intention of the testator.

Lapsed DeviseDevises.

2d May 1730

Pen 442.

And a devise may upon the general principle now under consideration be in part good & in part void. Thus if a tenant in fee simple devises one half to his heir at law in fee simple & one half to his heir in fee tail the devise is good as to the latter but void as to the former.

Finally a devise may fail of taking effect by the death of the testator before time thus if A. devises to C & his heirs. and A dies before the testator's death. the heirs of A can claim nothing. for the heirs is a word of invitation.

47 L 601

Further if in this very case the testator had republished his will after A's death see in 2d 439 still the heirs could take nothing for the effect Pen 670. of republication is only to give the words used in Doug 325. the original will the same effect as they w^o. have had 1 Mord 267. if first written at the time of republ. & if written at that time it w^o. have been void as being to a dead man.

2d

2d R 349

But if a charge has been created on the estate in the case now supposed that charge will remain & attach upon the estate. for the charge does not depend upon A's death. It is a charge upon the land in the hands of the heir. - for this incumbrance does not depend on the taking effect of the Devise,

Waiver express & implied,

There are all of the cases in wh^{ch} a devise Devise
may be defeated by

But still the devise may be defeated by ^{Per C⁴⁴².3}
other means as if the devisee waives his benefit ^{2 Inst 58/}
either express or implied. the benefit of it & such ^{232.3.}
waiver may be either express or implied ^{2 Inst 176.}

And implied waiver is some act from ^{2 Inst 40-}
wh^{ch} it is inferred that the devisee does not accept
the benefit intended him under the will.

It is a general rule in equity that if ⁽⁹⁶⁾
a devisee having a right to part of ~~that~~
^{a man's estate independent of him} the estate ^{as}
donated as a matter of right. & to part, only
from the devise as matter of bounty apart
his right in opposition to the will he
waives the part to wh^{ch} he is entitled
only under the devise. Thus a man
devises certain real estate to his wife instead of
down now if she appts her claim to down
she waives her right to the devised estate.

✓ Thus again where A owned whiteacre in fee & a
life estate in blackacre remainder to his second son
B. A devised whiteacre to B & blackacre in fee to C.
B was not permitted to claim blackacre unless he
w^renounces his right to whiteacre under the devise
for where a man devises what he has no power over on
the supposition that his will will be acquiesced in the C
of chancery will compel the devisee if he will take advantage
of the will to take entirely & not partially under it. ^{1 Vars 18. 426.}

Now this doctrine of waiver is founded on a ^{2 Inst 176.}
lascit condition that the devisee shall not disturb ^{2 Vesp 1st. 67}
the disposition wh^{ch} the testator has made ^{Per C⁴⁴⁵.6}
^{453.4.-}

And it is not necessary to give effect to
this rule ~~that the thing~~ claimed under
the will & that ~~of~~ the will shd. be of
the same nature -

Real Property (No 23)

Devised.

In such case (see last number) a C. of Eq. 2 V. 314
 will oblige the devisee to make his election on a Feb 176
 bill filed for that purpose - Pn. 453.4.410

We have in this State a Ct prescribes the mode
 in which a widow shall make her election when
 she claims property under a will & down in
 opposition to the will -

But the rules concerning election hold only 2 V. 111.412
 where the devisee is mere volunteer claiming under 2 V. 617.50
 the will as master of bounty in ~~testamentary~~ Soc. 2.454-8.

Thus if the devisee is a creditor he may claim 463.5.
 his ^{right} ~~debt~~ in opposition to the will & still claim
 under the will his debt. for the equity will
 not allow a man to assert a right in opposition to
 the will & still claim a bounty under it yet that to
 will allow a man to assert a right in opposition to the
 will & still claim a debt of justice under it.

If land to which it has a higher claim than 1 V. 298.309
 the testator is devised to J. by an instrument Pn. 2.458.
 not executed as the Ct requires & a legacy
 is given to it. it may assert his claim to the
 land intended to be devised to J. and still
 claim the legacy. for the Devise to J. is no
 devise, & will not be taken notice of by Ct

(100) Devises - How it may fail of taking effect?

But if there is an express clause in the devise
that a legatee who disputes the devise shall
forfeit his legacy. if the legatee disputes any
disposition in the will he cannot claim the
legacy. for this is a legacy on condition. even tho'
the devise be as in the last case void for want of
requisites.

(101)

3 Atk 430. And in all cases in order to oblige the devisee to
elect it must be clearly proved that the devise
taking both interests will defeat the clear intention
of the testator
2 Eq. Cas 301
1 Rec 730.

1 Wm 95. A devise may also fail of taking effect in
consequence of the testator performing in his life-
time what it was the intention of the devise to
accomplish. Thus where a testator devised £200
for the purpose of completing a building for the
lessee but during his life the testator expended more
than that sum on the house. the devise failed of taking
effect.

2 Bl 378.
3 Atk 434 And finally a devise may fail of taking effect
in virtue of the Statute fraudulent devises 34 &
35 Eliz. 1. By this Statute all devises are void
as acts such executors of the devise as do
have taken the land in the hands of the
heir. the effect of the Statute is to entitle
the creditor to satisfaction out of the land
devised when other assets fail.

2 D 125.

1 Hms 29

2 C 434-4.

2 Rec 27.

Before this it if the debtor aliened the land Devises
before an action brought against him the land was 2 Bl 378.
discharged from the debt. 3rd 473.

When a creditor who went to lands devised for 2 Bl 378.
his debt he must sue the heir & devisee jointly 3 Atk 434.
for the creditor cannot determine in whom the 3rd 473.
title is, & the Stat expressly makes this provision

We have no particular st like the st of prns:
devises but our genl statute law gives all the
creditors of the testator a preference to the
devisee.

This English st however affects only the relative 2 Atk 435
rights of creditors & devisees it does not relate 3 Atk 436
to the relative rights of heirs & devisees. That 3rd 474.5
is the st by subjecting the lands of the devisee
does not relieve the lands in the hands of
the heir at law & indeed the lands in the
hands of the heir are just liable.

Devises

How far parol evidence may be admitted to controvert a devise.

Lord 345.

5 & 6 Eliz.

6 & 7 Eliz.

2 & 3 Willm. 126.7

141.

1 & 2 Eliz.

3 & 4 Eliz.

2 & 3 Eliz.

"Evidence"

¶⁶ The testator's parol declarations ~~the construction of~~ ^{cannot} be given in evidence to controvert ~~the words used~~ in the devise or to give them an import which they can't ~~on the face of it bear~~. This rule has prevail'd every since the St of wills, & obtained in case of wills at com: law & is founded on the doctrine that the language of a dead can't be controverted.

Parol evidence has sometimes been allowed to vary ~~a~~^{the} prima facie import of words.

S. & S. 471

Court 470.

Now a testator's declarations may relate to the devise or to the devisee but in both cases these declarations are inadmissible in genl when they relate to a question of construction on words used. Thus

4 & 5 Eliz.

Ad Ray 438.

1 & 2 Eliz. 219

Post C 480.

¶. If one desires to his wife for life genuinely parol evidence is not admissible to show that he intended it instead of down. vide post 120.

S. & S. 132

2 & 3 Willm. 333.

P. & C. 450.

N. & S. 138.

1 & 2 Eliz. 231.

So where one devised an estate on condition ~~letter~~ written by the testator were not admitted to prove that according to his understanding the conditions had been broken.

✓ So where one devised real estate to his daughter Devises,
 parol evidence was offered to prove that it was 20 M^r 316
 the testator's intention that it shd be for her 17 Es 189
 sole & separate use, but it was rejected. Every 20th 216.37;
 such intention must be part of the devise Pou^t 484
 itself.

Algernon where a testator had previously named 27 Es 216.47
 in his will two females & afterwards said I leave you 450.
 to her such property in this case parol evidence 60 E 472
 was not admitted to show which of the two Rec in 654
 the testator intended. The ambiguity here Pou^t 485.6.
 arose on the face of the instrument. Plow^t 345.

571 ✓ But as to what are called matters of fact or Talb 240
 latent ambiguities the genl rule is that parol Pou^t 475.
 evidence is admissible to ^{explain} them if the prop 512. 521.25.
 is consistent with the terms of the instrument 27 Es 216.
 but not to contradict the language of the instrument

Ex^t y^a. a devise to his son A. he having two 56 68.6.
 sons of that name parol evidence was admitted 8 Co 155.
 to prove that the younger son was intended to 17 Es 231
 his declarations in such case w^t be admissible 20 M^r 137
 for the ambiguity was latent on the face of the Pou^t 485.9
 devise all was clear & in such cases circum- 495-7.
 stantial evidence as well as direct evidence 18 M^r 674
 is admissible, 672. 671
 20 M^r 137

(108).

Carol Erickson,

Devise So where one devised the manor of S. having
860 155 two manors of S. parol evidence was admitted
1 Br 66472 to show wh^t of the manors was intended.
Poul. 488. 90.

3 R 26310

1 Mod 17

Poul. 490.

So parol evidence has been admitted to show
whether a given instrument wa^s intended as
a will or a ~~deed~~ ^{des}

Now this was admitted on the principle that
it went to the execution of a given instrument
as much to the execution, as the fact of signature

But if on the face of the instrument there are
words of present grant such evidence is inadmissible

Salky

1 Atk 411

2 P.M. 186.

6 mod 100.

So where a devise was made to a B + there was
father & son of the same name parol evidence
was admitted to show that the testator
did not know the father, wh^t was admitting
circumstantial evidence to explain a
poten latent ambiguity.

60 100. And where a devise is wrongly named & sufficiently
11 6021a described parol evidence was admitted to show
67 R 671 wh^t was the person intended. C.W.P. says
Poul. 337. 340. that this is not the rule as to deeds but
405.7. 498.9 it says the rule is the same both as to
463 n. 35. deeds & devises -

Codditt 3a

To where one devised to the four children of AB Devisees.
when in fact she had six four by one half & two 2 1/2 2 1/2
by another. parol evidence was admitted to show Pou. 495. 521
that the four by the first h^d were intended.
Here the ambiguity is latent.

That a devise to one of the sons of a he 1615
having several cannot be explained by parol 60 155.
evidence, The ambiguity is on the face of 2 Verm 624
the instrument. — Pou. 6185. 90

- 10/ If the person described as Devisee applies to 16th 410.
one & the name applying exclusively to another 672 671
parol evidence it seems is admitted to show Pou. 6498. 9
whether the name or description shall govern rule 67. 73.
As to J^r the eldest son of Thomas I.
there being J^r. not eldest son of Thomas to

And where a testator gave a legacy to a person 24th 240.
by a wrong name. parol evidence was admitted Pou. 6499.
to show that the testator used to call her by 2 Eq. ca. 416.
the name mentioned in the devise. Here it
might be alledged that the legatee was
known & called by her wrong name &c,

Parol Evidence

Device, still if the person wrongly named as devisee
2 Rev 27:8 is not described at all except by the wrong
name. It is said that no evidence can
be admitted to show who was intended, but
this case comes very near the last.
Here the evidence is not consistent with
the terms of the Device.

If it could be shown that John ~~meant~~ ^{meant} John I conceive evidence would
be admissible.

406 32 But notwithstanding the gen'l rule
Lg 337 respecting patent ambiguities yet it is said
Pou^l 340 that if the term used is in itself equivocal
parole evidence may be admitted to show
what was intended by the term used.

This rule may perhaps be reconciled to
principle by analogy to the case where
a foreign word is used in which case parole
evidence must show to the court the
meaning of the word,

In these cases however parole evidence is
not admitted to give words in the instrument
a meaning wh^{ch} they ^{from the law of the devi} cannot bear thus the
I. 106:7 word son has been sometimes construed to
2 Rev 243. mean a grandson where he had no son
but a grandson - but where the designation
is my son & it is evident from the instrument
that the word son was intended to apply
to a son & not a grandson parole evidence
was not admitted to show that grandson may intend

Thus where a man devised land to his son & a Devisee
legacy in the same instrument was given to a ^{son. 5775 Pow}grandson. parole evidence was rejected where ^{2 Nov 7.5} it was offered to show that son meant grandson ^{Bar 340} for as the testator had once used the ^{Ray 408 M.} word grandson the Ct. thought it inconsistent ² with the devise to show that the testator used son & grandson as synonymous.

(113) Parole evidence is never allowed to supply ^{2d Ch 24c} what the will omits for to allow this would be ^{Pow 523. 501} to allow a will to be made by parol. besides ^{2 Eq. ca. 415.} the uncertainty is patent.

Where the testator gave direction that all his ^{2 Eq. ca. 415} estate should go to his executors but the ^{Pow 523.} clause was omitted by the scrivener parole evidence was rejected until was offered to show that the testator gave directions that the clause sh^o be inserted, "voluit sed not dicit"

If such evidence could be admitted a will might be made by parol

Devises 110.6. f law & equity have admitted parol evidence
 3 Feb 1894 of equivocal facts, & settling of two meanings as
 1 Oct 1894 to the quantity of interests, provided this proof
 5 Dec 1894 stands with the devise. This proof of the testator's
 circumstances i.e. has been admitted where a
 term of equivocal import was used -
 thus the devise was all my estate to A.
 he paying my debts - parol evidence was
 admitted to show the deficiency of personal
 assets & that of course a fee was intended
 to pass.

3 Feb 412
 1.7.2. 412
 2.7.2. 507
 4.7.2. 73
 5.7.2. 562
 6.7.2. 34
 But it will be unnecessary now to admit parol evidence
 in the case just stated to explain the word "estate"
 for the word estate now in its terminus carries a fee
 where the testator has a fee - "estate" means
 now prima facie at least "interest".

8.7.2. 67.502. 1.0.7.2. 559. 1.0.7.2. 344.

8.7.2. 503 = It has been sometimes contended that the
 2.8.4. 92.51 word residuum carried a fee but it is well
 3.7.2. C. 356. settled at this day that it does not signify
 5.7.2. 558 quantity of interest, but the subtestate matter
 6.7.2. 175
 8.7.2. 447

8.5.2. ca. 298 It had to ascertain the quantity of land included
 3.8.2. 1898. proof was formerly admitted as to the value of the
 2.8.2. 71. land devised as if one devised all his land or
 8.1.5. 506. 7.1.3. he paying to B £100 per annum proof was admitted
 to show that the sum charged exceeded the annual
 value of the property given.

But it seems now well settled that a levy of Devises
land with any words of limitation charged with ~~the~~
the part either of a gross sum or an annual sum 66.16
carries a fee of sonnet & that there is now no need ^{3.00} of ~~3.00~~ 356.
of parol evidence concerning the value of the 5.00 1.292
lands. 1.70 1.503.

3 Ban 1023-3 Barr 1533 2 BtP 250.1.1 BtP 538. 4 East Hgb.

The principle is that if the devise sh^d take only
a life estate he might be a looser but the tenur
is always presumed to be the object of the testator's
bounty.

The value of the land then appears, not ^{now} ~~now~~ to be at all material.

In this case too if the devine accepts the book
gift he builds himself personally for the pay^{mt} 2 MR 344
of the charge created by the devine 2 BA 4250

But still there is a distinction between cases in all the charge affects the person 1. 870/- devolving until the charge affects only the 2840/- lands for in this last case since the debt is 500/- cannot be a loser by taking a life estate he 500/- only takes an estate for life

Under a devise of "land" to a he paying
£1000. or my debts from the profits thereof £6016
+ takes only an estate for life. for here 38 Ban 1541. 2
are no words of inheritance. & if the 1623.
devisee takes only a life estate he cannot be so
loose for he is bound only to the extent of the
profits. - Comp 239
2.84 P 950.2
2.4 R 343

Divises, Where the devise was that I give my land
3.18.350 to A. my debts & legacies ~~beas paid thereout~~
this was formerly held to carry a fee

2.18.0252. This does not appear to be consistent with
2.18.349 the last rule, for the word 'thereout' was
5 East 83 probably used by the testator in the same
3 June 1544 sense as "out of the profits of it" But the
distinction is this in the last case, it is
a residuary legatee, & equivalent to this I
have my land with the pay^t of my debts
& legacies of the land which is not necessary
for this purpose I desire to A, & he takes
it because he is the person to sell the land,
he cannot sell without having a fee simple -

5 East 1793. ~~In~~ In a late case a devise of land to A
(2.18.350) ~~be paying thereout to~~ A took a fee. for
the paying thereout means the paying not out
of the profits, but out of the land, he therefore
must sell the land but where the land is
to be sold, the devise must always sweet have a
fee.

5.18.004 But where the devise was of "all the rest of
538. my lands to be to A after pay^t of debts" 2.18
6.18.175. was held to take only an estate for life for
5 East 1749 here A B was not to sell the land & though
so early A B had nothing to pay. & he takes just the
2.18.0247 where land at all. It is not a devise to
1.18.175. a subject to the pay^t of debts, but it is a devise
of the lands after the debts have sold enough to pay
the debts

Again proof may be admitted concerning the Devisee,
situation of the testator's family to ascertain 6607
the explanation of a term whl may be a word 6ay 309:10
of purchase or of limitation (See Estate). 17R 456.

As to w & his children, proof is admitted 4 HBL 2914
to show whether or had children at the time 1 A BL 456.
of the devise made. The proof must not 1 A BL 461
contradict the words of the will, Pou: 505.

1 Went 227

Such evidence has been admitted as to the
state of the testator's property for the same purpose
is to ascertain the meaning of words not
strictly equivocal in themselves but all considered
with reference to the testator's property will bear a meaning
diff from their prima facie import

Thus in the case of the Bell Tavern will was talk 234
thus J S devised to a ^{his} son called the Bell Ray 431
tavern the fact was that the devisee was Holt 441
tenant in tail of the house & J S had only Pou: 505:9
a reversion. the C held that the ~~testator~~ devisee
took a fee for it could not have been the intention
of J S to give a life estate for what he already had

Thus the case of Foneroy & Points in 18r 6472
evidence was admitted as to the state of the Pou: 513.
testator's funds to ascertain the meaning of
the word "sum" used by the testator.

Viruses.

Paul Evidence.

Devises. In all these cases however the evidence must stand with the words, the perhaps not with the prima facie meaning of the words. If the word can not bear the meaning intended to be put upon them, spurious evidence will just be admitted to put that meaning upon them.

Tal 240 Parole evidence was not admitted when the
Stra 1161 testator derived ^{all the residuum of} his estate to his executors &
Pon 523:2 when the testator was owed by the \$4 or \$1000 -
to prove that the testator intended to forgive
the debt, because inconsistent with the legacy of
all the resid^m to when the residuum of the testator's prop.
Pon 5241 was not disposed of at all no evidence was
admitted to show that the testator intended
that the executors shd not have the residuum

But in Chancery there only parole evidence is admissible of the testator's words to rebut an equity, or oust an implication, i.e. an equitable implication.

This is a gen'l rule in equity, applying to all cases as well as cases of laches, in which a person by a bill in Equity claims an equity which is diff't from the disposition which the law makes.

To pursue this subject further.

Where from the face of the instrument an inference is raised in equity in favor of any ^{say 1679/1324} person, parol evidence may be admitted to ¹⁴⁸³²⁰ rebut this equity, so as to leave the instrument as ^{1679/1325.6.} it stands at law. — ^{2 Ed. 506.}

This land was devised to an exec'or for payt of debts, but there was a large surplus & at law this surplus belongs to the exec'or but in ^{1679/1325} equity consider the exec'or as to the surplus only as trustee to the heir. But on a bill brought by the heir parol evidence was admitted that it was the intention of the testator to give the surplus to the exec'or.

To Illustrate. A enters into articles to sell property to B for a given sum. But a afterwards made several qualifications respecting the price. A then brought a bill to enforce the sale. B was allowed to produce parol evidence of the qualifications, for this evidence instructed the conscience of the Chancellor whether he ought to proceed or to leave the parties to their remedy at law. The evidence is not admitted to control the instrument.

Devised. Again a testator devised considerable prop
2 Verm 677 to his ex'r. & the question was whether parol evidence
Falt 79 shd be admitted to show that it was the intention of
Pou^t 527.8 the testator to give the residue to the ex'r. It was decided
in the slaves & that because the ex'r had legacies in
the will that it shd not. but in the house of lords it
was decided that it shd be so? in favour of the ex'r or title

1 Ver 323. On the same principle evidence not contradicting
Pou^t 529 the will was admitted to show that a devise
This was on ^{an} Ex'r, was made as the execution of an agreement
agreed upon ⁱⁿ made by the testator to the devisee. Thus a K
at law by the informant agreed to settle \$100 per annum on his wife.
the wife ^{only} in his will he gave \$100 per annum. parol evidence
an equity action might be admitted, was admitted on a bill brought by the wife for the
had this been? performance of the agreement that the wife was intended.
not admitted as an execution of the agreement. - This evidence q
ante 105. - not admitted to affect the will but to prevent doubt

2 Verm 506. Satisfy Parole evidence is always admissible to
Pou^t 530. contract fraud. Where a person devised his real
estate to his ex'r & omitted to charge \$100 on the
land in favour of s. because the ex'r promised
to pay it. evidence was admitted to prove this
promise by the ex'r. for the purpose of contradicting
the fraud of the ex'r. It w^t be useless to say that
fraud shall invalidate an instrument & at the
same time refuse to admit parol evidence
of the fraud, the fraud will now appear
on the face of the instrument.

Revocation of Estates.

Wills & devices & all testamentary dispositions of property are ambulatory until the death of the testator. the death of the testator consummates ^{Abund 1512} every will.

Revocations as they stand at common law i.e. as they stood before St. of Frauds, were of two kinds express & implied. An express revocation is one expressed in terms & before St. of Frauds it might be either in writing or by parol. thus a will might have been revoked by a codicil or by a subsequent will expressly revoking it.

By parol as if the testator says 'I revoke my will' ^{Bro. 310} this before the st was a suff. revocation even of a ^{Bro. 615} will in writing. ^{Par. 1652. 533}

Bro. 115. 407

In case however of parol revocation the ancient ^{Bro. 61} revocandi must clearly appear. as if one says in haste or in passion 'I revoke my will this will not be suff.' ^{Bro. 617} solemn deliberate intention to revoke was necessary.

Words importing an intention to revoke in future do not suffice at common law revoke a will. as 'my will shall not stand for I will alter it.' if the will ^{Bro. 630} was not subsequently altered, it will stand. The words do not import a revocation.

No will such a declaration in writing after the ^{2 East 485} It revoke the will ^{490.}

(123)

Implied Revocations,

Devised

1st 73.

1st 753.

Son? 532.

An implied revocation may be by some revocation not expressly revoking or by some act from which it is inferred that the intention of the testator is changed. Thus if one having devised to a strange say, you into revocandi my son shall inherit - this is an implied revocation & before the Act of frauds would if said in words been held to revoke the first devise.

Pn 1835:54

The act manifesting an intention to revoke in presenti, or furnishing an inference that the intention of the testator is changed, may be either by writing or by matter in fact. Matter in fact here means words as contradistinguished from an instrument in writing.

(124).

3 M 65:22

Thus if one makes a devise inconsistent with a settled 206 former tho' not expressly revoking, the former will Son? 535:6 revoke the former as far as they are inconsistent. As if one devises all his estate two & afterwards to one of them, the latter devise revokes the former & the one takes the estate.

Bro Eq.

It is held however that if one devises his 1806:444 estate to A & in a subseqt part of the same 2.1th 774:5 instrument devises the same estate to another 1 Nov 30. then two take as joint tenants. But this seems 9 Mod 522 to be a doubtful point. -

2d v 2:9:10

3.2th 493 (to settle 112 b. 2.2th 374) 3 Atk 493. So 2d v 112 6 in note 113 a in note.

Still in the case of a specific legacy to a devisee
& in the same instrument to B afterwards B 220th 375
the subject legatee will take the whole.

But if there is an thing in the will by
wh^t the intention can be discovered the intention
will govern notwithstanding this rule —

The rule ought to be the same as to real &
personal prop^{ty}. It is a question of intention —

But a subject devise not containing as prep under Har^o 374
of revocation will not revoke a former one until 3d Ed 203
the latter is inconsistent with the former & no bomb 90
further than it is inconsistent with it. Salk 592

The mere fact that a subject will is made, Comp 87
is not suff^t to revoke a former will, Pow^g 536:44
= 2B&R 937.

26) And where on such an issue the jury found that
a subject devise was left from the fund East 488
but in what respects they knew not the b 780 P 344.
held that they could not pronounce the
former to be revoked.

The heir has the onus, probandi
in such cases.

Mr. Pow^g supposes that if the jury found that the devise was inconsistent with the former that the devise first made w^t be bad, but the inconsistency is a matter of law & therefore he thinks that Pow^g is wrong. If the jury shd. find that there was a total inconsistency this might alter the case tho' I think it w^t not. for the jury might consider two devises inconsistent w^t a party might judge consistent.

Implied Revocations,

Devises & a codicil too when inconsistent with a
 3 Atk 532 form will revokes pro tanto the former will
 1 Ves 32
 Powl 541

But there is a distinction taken between the revoking effect of a codicil & the revoking effect of a subseq^t will. viz that a codicil being part of the will & not in its own nature a revoking instrum^t will ~~not~~ revoke only in the degree expected. Whereas as P say a subseq^t devise varying a previous disposition is a total revocation.

Pu 8344. Thus land was devised to three trustees to a 17 Ch 178. 186 charitable use, by a cod: the same lands were 17 Inst 444 devised on the same trusts to the same trustees & two others. here the rule is that the trust is not revoked. the only effect is to modify the authority originally given to them by giving it to five. Whereas it is said that if instead of being a cod: this had been a subseq^t devise instrument the first would have had no effect & the trust would have been executed according to the latter. The practical diff exists in the mode of pleading. in the first case the trustees must plead under the will & cod. in the latter they must plead under the latter will alone.

Real Property ch 24

Devises

If one makes a second devise inconsistent with the former one, under a false impression Pow 546. as to a matter of fact wh^t furnished the motive to the second devise. If this motive is expressed in the subsequent devise. & if after the death of the testator it is found that the fact supposed by ~~testator~~ by the testator & not furnished the motive to the second will the first will is not revoked.—

Thus a man devised land to A & in a subsequ^t instrument reciting that A was dead he devised the same land to B. — after the death of the testator A was found alive & it was held that A took under the first devise. — This differ from the case (ante) of a devise to a younger son on the supposition that the older was dead b^t because the death of the elder was not there recited & though this case

If the second devise is to B whom he calls "revocation" his wife but it is found after his death because founded that she has a former husband living when in the former the devise was made & that he was ignorant of that fact. a former devise of the same property will not be revoked. — In must the will void because mistake to render the devise void arise from mistake — any deceit practised on the testator Pow 546. It clearly not.

Where a former devise is revoked by a second merely on the ground of its being inconsistent with the former. the second devise is amenable until the death of the testator. — if the second devise is subsequently destroyed the first will be good. 4 Ban 252 Pow 549 Pow 5479

Divines But it seems that if the second devin had
 Chap 53. expressly revoked the first. a revocation of the
 Doug 40. second will not establish the first. for here
 Ptol 581.4 the revoking effect does not depend on the
 2 Gall 266 inconsistency of this wth the former. & by this
 Scicna 55.6. express revocation the former is immediately
 revoked tho the disposition in the second ~~will~~ be
 revoked afterwards.

4 Jun 25/12 This point is not however expressly decided.

Chap 92 But the reason seems to be that the revocation
 when express is a substantive act & acts in
presenti. In the implied revocation the Revoc.
 arises from an inconsistency whch is destroyed when

(130) the second devin is ~~destroyed~~ / but implied revocation may be by settled
 Scicna 584.65 in part by some collateral extrinsic fact.

First by an alteration in the domestic
 relations of the testator.

Secondly by an attempted alteration in
 the estate devin or by an alteration in it in
 fact —

4 Jun 26/12 First if a man while unmarried makes a
 2/82 will afterwards marries & has a child by
 1/8 Mar 30/4 the marriage the prior will is revoked.
 1 Eg. cas 46/8 but there must be both marriage & the
 Doug 55. birth of a child. If then a married man
 1/8/92 makes a devin and afterwards has a child
 1/8/93 the will is not revoked. & if an unmarried
 1/8/91 man marries after having made a devin & has
 Ed Ray 34/1 no child the will is not revoked.
 2/8/92

This rule holds however when the child is Devised
posthumous.

I E Marriage & the subsequent birth of a posthumous
child are an implied revocation,

In this state by it the subsequent birth of a child
alone is a revocation of a former devise unless
the will provides for such a contingency.

The reason of the common law rule is said to
be that from such a change of domestic circumstances
a change of intention can be presumed. Long 31-9.

(131) But it seems to be admitted that any evidence Par 536.9
written or parol is admissible to prove that the testamentary Eq. ca 413
intention shall stand. for parol evidence is admitted Long 31-5.
to give effect to the will & to rebut a presumption Eq. 24411
arising from extrinsic facts. Every presumption 2.518.522
de factis may be rebutted by parol evidence 2. East 630
543.4.

This rule has been doubted 5 Vez 4-448. 664. i.e.
it has been doubted where the decessors of the testator
are admissible,

The reason given however for the rule that a 57. R. 57.9
change of domestic circumstances &c. is not
broad enough, is in the case of a posthumous child
if at the death of the testator such a child was expected
by him and it should happen to be an abortion. The devise
is not revoked & yet in expectation of this child the
intention of the testator may be presumed to have
been changed. Besides an intention is not suff.
robust sed non dignit. -

Implied RevocationsDevises

58058.

63.

2 East 5812

What then is the true ground of this rule? Mr Kenyon says that there is a tacit condition annexed in contemplation of the testator to every devise that he does not intend that the devise shall not take effect unless if there is such a change in his circumstances.

2 East 541.2

Court 540.

556.7.

12. ca 413.

There has been no case decided in all the two subsequent events of marriage & the birth of a child have been held suffice to revoke a former devise unless the whole estate is devised by the former will.

12. ca 413 And it seems too that if the wife & child Doy 38. 410. are well provided for either by the devise itself Court 556.7 or by his leaving part of his propy in testate 560. but then circumstances of marriage &c will not ent to a revocation. The presumption of a tacit condic is not annexed ..

Doy 39

2 East 530.

And clearly subseqt marriage & the birth of a child are not suffice if the devise is made in contemplation of these events, and making provision for them. For it w^t be absurd to hold that a devise is revoked by the happening of the very circumstance, on wh^t it was intended to take effect

Implied Revocation (135)

Thus if a man makes a devise to such wife I devise
as he shall afterwards marry & marries her & leaves ^{169: ca 403}
a child & a legacy was given to his brother ^{170: 556}
the legacy was not revoked for provision was made
made for the family & the whole estate was not
disposed of to a stranger.

But if a feme sole makes a devise & marries
her marriage alone is clearly a suspension of the ^{46 Ch 1}
devise during coverture so that if she dies before ^{1 Dec 291}
the death of her husband the will is clearly revoked ^{See Br. & femore}
for it is an essential requisite a quality of ^{4 Ves 1: 160}
every devise that it be in the testator's power ^{Poult 563.}
to confirm or revoke it. but a feme covert
while married can do neither & therefore the law
revokes it for her or at least suspends it,

But if the wife in this case survives the husband ^{H. 26m 2513}
& if she becomes capable of revoking a confir. satisq.
etc. if she does neither is the will valid? ^{2 R. 692 arg.}
(Plowd 343. Poult 564. say it is) Q? Keayon thinks
that the will does not stand. ^{4 Bul 2513 arg.} 2 R. 499 Ch.
Shows that it is void. But J. G. thinks that ^{2 R. 689.}
the true opinion is that the devise is good ^{Poult 173.}
for she is capable of making a devise at the time of making it & at the consummation.

In this st. the last question cannot arise
for by our st. law she may make a devise
during coverture.

Implied Revocations

Desires In the other hand an alteration in the 460th nat^{al} capacity of the testata wh makes 508⁵. him incapable of confirming or revoking 525^{723.} not effect the will. for no change of intention 723. can be supposed in this case. nor is there here 1105. 1 Eq*c*o 274. ground to apply this original condition. — for we are now not supposing a case in wh there is marriage to after the devise —

2 a devise may be revoked by an actual or attempted alteration in the property devised. after the devise made.

574 When the revocation is an actual alteration 180¹ 574 of the estate after the devise made. the revocation 565. is of positive law & is not founded on any supposed 532. 607 alteration of intention in the testator

But where it is the consequence of an attempted alteration the revocation is founded on the testator's intention to revoke

566 The former rule is that an actual alteration 61. revokes the devise is on the principle that the 738³⁹⁹ devisee must be seized at the time of the devise 2.436 576. manor & must continue seized either in fact or 1.849. 576. in contemplation of law until his death 14R 421. Now the alteration of the estate breaks this seized & any alteration in the feoffold wh puts the estate in a diff^t plight from what it was at the time of the devise made revokes the devise

Implied Revocation, 139.

Such an alteration may be effected either by Devises the devor. or by the act of another or by law.

1 By the devor. If he alienates the land devised. - 1 Rols 65

If he makes an alteration in the legal Pow 567 estate only retaining the beneficial interest after 1 Wilms 31 devor made. - Thus tenant in fee makes a 7 R.R. 399 feoffment after devor to the use of himself 2 R.S.P. 117 from this feoffment he holds the land by a new 4 R.S. 1000 limitation & therefore the devor is revoked. for it 1 R.S.P. 576 is precisely like a devise made of lands before they are 4 Rols 253 purchased. Dyer 143. 10th 566

(1 Shawa 92; 3 12 " 592)

(40) So if one devises land & then alienates the land & takes a reconveyance the devor is revoked. He now holds the land as a new purchase 1 R.S.P. 576 Pow 567

Dyer 143. 10th 566

And where one having devised the land after 1 Wilms 440 made a marriage settlement limiting the 7 R.R. 399 estate to himself & his children remaining etc. It was held Pow 509. that the devor was revoked. - For the testator held by a new purchaser.

And where one suffered a recovery of land 2 R.R. 395 to the use of himself it was held that this 3 Wilms 6 revokes a devise of the same land - For under 2 R.R. 401 the recovery he takes as a new purchaser 7 R.S.P. 6177 Pow 570 &c

(41) And the genl rule applies as well to equitable 1 Eg. ca. 144 as to legal estates. If therefore magagon 2 R.R. 74.579 after having devised his eq. of redemption conveys 503. it to himself by fine & recovery the devor is revoked Pow 572 &c 4 R.S. 196

Contra (long 722)

(141)

Implied Revocations

Devised And a subseq^t alteration upon an estate
 3ster 108 before devised over tho' the alteration itself
 3.8Mwms163 is necessary to make the estate describable.
 7CR 406. Thus where tenant in tail devised his estate
 2.4BL523 + afterwards conveyed the estate to P.S. to
 2 Nov 1401 the use of himself. the devise was not strictly worked
 Novt 583. but it was held to be void.

(142)

3.8Mwms170
 talk 344
 1st 575
 1 Dec 614

that if a man conveys to Lucy a fine
 to the use of such persons as he shall name in
 his will & then makes his devise & afterwards
 leaves a fine the devise is worked by the fine

2.2th 574
 2.3.2. 587
 7CR 399
 1st 582
 Court 586.

but so strict is this rule that when the subseq^t
 alteration is expressly designed to be for the
 purpose of giving effect to the devise the above
 is still worked, for the alteration has nothing
to do with this rule. The rule of course
 supposes the alteration such that the testator
 holds as by a new purchase.

(143)

3.8th 583.4 And when a man actually seized in fee but
 2.4.2.523. acknowledging himself tenant in tail suffered a
 2.3.582.5 reason to confess his error that was held
 a revocation.

+

2.2th 573.
 Rec 2.6.319. And the case is the same as to a specific
 lease for a term for years with a renewable
 2.120.448. ex gr. If a man having a lease for 50 yrs.
 1st 576. renewable designs it specifically thus "my lease for
 1.8.6m 575 50 yrs." & then renew the lease like wise
 2.2. 168 worked, but here the reason is not the same as before
 3.2. 163. for here the lessor's rents do not include the renewed lease

But if a man derives all the leases & ^{then} he Devises.
shall die possessed all the leases will be ours at his 32d 1741
death with p[ro]p[erty]. therefore if in the last case the w[ill] 149.
had been all the leases of which I shall die possessed the deth 23d
renewed lease would have p[ro]p[erty].
1774 1575.
P[er] 58 p[ro]p[erty] 90.

- 145) State where the revocation of a prior devise
depends on the simple fact of a subject alteration
there must be a substantial alteration, or there
is no revocation.

In this principle it was formerly held that 1683 64
if one having lands in fact devised them & afterwards had a
covenant to convey other lands. the land is 1705 5755
covenant is no revocation and this is now the 20th 1782 6
rule at law. but in equity if this covenant is 624.
such as that & wife enforce it. this covenant
is a revocation for in equity the covenantee has
a title to the land,

- 146) But a devise of an equitable interest in a 1705 6
trust estate is not revoked in equity by a change 16th 223.
of trustees. Thus A holds land in trust for B & 20th 209
his & B having devised the land. causes his trustee
to enfranchise other trustees to the same uses. this
change of trustees does not in equity revoke the devise

For this change of trustees affects only the
legal estate & B only devised the equitable
estate —

Implied RevocationsDerives

to it one having contracted for the future
 Doug 684.31 purchase of land & then derives his estate & then
 Doug 576.18. completes the purchase the devise is not revoked
 1 Wils 311. for the equitable interest remains precisely as
 it was before. At law the devise will be
 at initio void - but in Equity when the devise
 was made the testator had title & now he has only

Doug 684. ~~taken the estate home~~ but it is now a gen'le rule in equity that if
 or 710. a person having an equitable interest in fee devises
 Doug 597.9 it & then takes a conveyance of the legal interest
 1 Wils 311. the devise is not revoked.

3 P.Ms.170. Thus if a mortgagor derives his equity
 2 Wm 679 of redemption & after this pays the debt &
 7. 2. 4. 1. 7. 1. takes home the legal estate the devise is not
 revoked.

And where several successive instruments taken
 together constitute but one conveyance in law
 a devise made between the time of the signing
 of the first instrument & the completion
 of the last is not revoked. for the consummation
 has relation to the inception of the devise is therefore
 made in law after the conveyance.

1. 21. 2. 251. Thus the devisee makes a conveyance to him
 7. 04. 6. 605. for the purpose of suffering a recovery & then making
 3. Jun. 1. a devise & then suffers a recovery to his own use
 4. Jun. 1962 this devise is not revoked by the subsequent recovery
 Doug 600. for the subsequent recovery takes effect by relation
 at the time of making the deed to him the devise
 & therefore no alteration in the estate is made after
 devise made

A mere partition between tenant in common or co-parceners does not revoke a devise made before Reg. 240 the partition. For the partition makes no alteration & merely ascertains what belongs to each. *Per* 602.

But if the deed of partition alter the estate *3 Feb 1857* this deed would revoke the devise. - The rule *1 Sid 90* supposes that the partition is confined to *1 Wills 309* that one object. - If the deed of partition *3 Ath 742* extends further than this & makes a disposal of the property seems. *Per* 603.

Here one has made an actual alteration in *2 Ath 516* an estate before devised no parol evidence & *3 Ath 741* no evidence is admitted to show that the *2 Nov 447. 59* testator did not intend to revoke the devise for if the intention was clearly expressed on the face of the devise still it w^t have no effect. These rules are not founded on the intention of the testator.

A devise may also be revoked by an unsuccessful attempt to alter the estate devised. Thus if one after having devised his estate attempts by deed to convey away the estate but the deed fails for want of requisites or for want of capacity in the testator grantees to take this deed tho' ineffectual revokes the former devise. This rule is founded on a supposed alteration of intention. - The devise is prima facie revoked.

But a subsequent ineffectual devise of the same estate will not revoke a prior one because the subseq^t devise does not attempt an alteration in the estate until the testator's death. the testator indeed is presumed to take away the estate from the first only on condition that the second shall take.

Implied Revocations.

Devises. If one makes a deed of feoffment after devise
Sph. 100. of the same estate but with livery of Seizure.
3 Atk. 72. s. has this the feoffment is ineffectual yet as it manifestly
Pou. 606.7 an intention to revoke the devise it will be revoked.
1 Bl. R. 349.

1 Wm. 178. 187

Pou. 606. But as such revocations are founded on the
Brou. 96. presumed intention of the testator the inferred
revocation may be rebutted by parol. Thus if
the testator declares that it was not his intention
to revoke parol evidence of such declaration is
admitted

2 Cq. c. 359. If there an attempted alteration is ineffectual tho'
y. Mod. 190. the incapacity of the devisee to take the prior
10. do. 237. devise is revoked. The last devise in this case
1 Bl. R. 615. the inoperative as such shows an intention to
3 Atk. 72. revoke. & the last devise is here supposed to
. Rot. 41. 6. be executed properly according to the revoking
Pou. 606. clause - If one having made a devise makes
a grant of the same estate to the wife this grant
is void at com: law will yet revoke the devise

If the grant to the wife was of a reasonable
part of the bus: estate a b' of eq: would support the
grant & therefore the devise only in part revoked.
(in equity). (Brou.)

By a stranger.

Devises

Thus if a stranger disposes the testator's estate & continues the disposition until the death of the testator the devise made before the disposition will be H. 6. 57a. 46. revoked. or rather this devise is void, Pur C. 6. 84. 50
607. 674.

But a stranger cannot revoke a devise by tearing or cancelling of it if it remains legible. 2 Verm 444
Pur C. 612. 152.

And it is thinks that if the devise was destroyed by the wrongful act of a stranger still it w^{ll} be good if its contents c^o be discovered by a duplicate or by parol. This has been determined in a still stronger case in Comt where the devisor being insane tore his will. the contents of the will being proved by parol it was held that the devises in the torn will took - (Medly's case Fairfield)

A devise may be revoked absolutely or conditionally or in whole or in part. Revocations have heretofore been considered as absolute.

Thus if one having devised his estate mortgages it even in full the subject mortgage is in Equity 1 Verm 329 only a conditional revocation pro tanto to Salk 158. if the mortgage is discharged the devise takes 3 Atk 748. 505 the estate absolutely, 2 Verm 329

This w^{ll} be at law an absolute livery 2 Verm 326. revocation for at law there is a total alteration in the estate but in equity there is no alteration of the feuds - If the mortgage is not discharged it is a revocation pro tanto. & the devise may have the land on paying the debt -

A mortgage is no sale it is a mere pledge. & the mortgagee's interest is personal property.

Implied Revocations

Devises ¹⁶¹ if one having devised his real estate
 2. 17th 14. 372 makes an absolute conveyance of it to a
 Recipient ³² creditor or that he may sell it for the purpose
 2 Nov 241 of satisfying the debt & account for the
 3 P.M. 344 surplus to the testator & if the testator dies
 1 Eq. ca. 410 before the sale. the devise is revoked only
 Pow. 619 - ^{by tanta in equity.} for this conveyance
 the absolute in terms is yet in fact condit-
 onal & the transaction is nothing more
 than the testator giving a power to sell
 & the donee by paying the debt may
 take the estate.

If indeed in this case the land had
 been sold by the testator during the testator's
 life time. the sale would have been a revocation
 of the land at least whether the devise would
 be in that case entitled to the surplus is doubtful.

7. 2. 410
 3. 17th 748.
 Pow. 617

What a mortgage for year is even at law lais
only a revocation of a prior devise in fee, only
for the term & the reversion is in the devisee.
 & in equity it is only a conditional revocation
pro tanto. & in equity the devisee by paying the
 mortgage debt will take the estate in fee from
 the incumbrance of the term. immediately on the
 death of the testator. tho' at law he could not take
 the estate until the expiration of the term.

Decr. 1. 204
 Pow. 68. 19.

A mortgage whether in fee or for years &
 made to the prior devisee is a total revocation
 both in law & in equity. On the principle
 that a devise & mortgage are incongruous.

St. 1. 417. 110
 7th 186.

This doctrine has been since denied in toto
 & it is very properly denied.

Revocations

of partial revocation may operate either by diminution of Devise
the quantity of what devised or the subject matter devised. ^{1 R. & 6. 23.}
hence if one devises in fee & afterwards leases to him for life 1 R. & 6. 16.
the devise is revoked only for the estate for life. this is ^{1 R. & 6. 24. b}
no alteration in the purchase contemplated in the former
rule for here the lease for life is only partially incon-
sistent with the devise in fee.

And if one having devised an estate on condition ^{1 R. & 6. 24}
afterwards sticks out the condition the condition
only is destroyed & the devise becomes absolute.

If one devises to A in fee simple & by a subseqt instrument devises to A in tail the latter is a revocation ^{Coupl. 90} ^{1 R. & 6. 24. b}
of the former only to the extent of the diff between the two estates. in a tail only an estate tail.

A subseqt lease to a stranger for years to a stranger is a revocation of a prior devise in fee only pro tanto -

But if a subseqt absolute lease is made to a prior devisee it is a total revocation. On the principle ^{6. 1. 4. 2.} that the two estates are incongruous. This rule only ^{1 R. & 6. 2. 7.}
went to the case in wh. the lease was to take effect
on the testator's death.

But this rule is now denied & a lease ^{3 Ves. 1. 600. 4. 17.} to a prior devisee is now no revocation - ^{5 Ves. 1. 55.}

(156)

Revocations under the Statute of frauds

Devises

one having devised his estate in full compliance
wth § 4117 to A afterwards make a devise to B the
testator's creditors cannot take the same (they
may take the reversion). - *In the present*
case by reason

2 Rev 720 A devise may be revoked in part as to the subject
matter. If one devises three farms to A & makes a
subsequent devise revoking one of these farms the devise
is good as to the other two farms.

2 Causa 71

Pu 5 627:8.

I have hitherto treated of revocations with
reference to any Statute. In the St of frauds
there is a clause on this subject

w^{ch} that no devise shall be revoked other
than by some other will or codicil in
writing or by burning, tearing, cancelling or obliterat-
ing the same by the testator himself in
his presence & by his direction & consent.

or 3^d unless the first devise be altered by some
other will or codicil in writing or other
writing signed in the presence of the witness
declaring the same.

Here I ought to remark the difference
between this clause & the clause in the devining
clause of the st. In the latter the words are that
the witnesses shall sign in the presence of the
testator. in this the testator must sign in the
presence of the witnesses.

Revocations (158)

It has been held that this st estones not only Devises
to devise of lands but also to legacies & sums of money 2 Atk 172
charged on land.

Batch 81

Mar 1860

This st does not affect implied revocations for 1 Bl. 2340
it leaves all implied revocations as they stand at batch 81
com: law. — In 5 IR 49 tc. It is said that if this 3 Atk 73. 503.
were res integra the determination might be diff. 11 Vesey 187
so also it does not affect revocations by a simple
alteration or an attempted alteration they are
indeed implied revocations

This st thru introduces a new rule only as
to express revocations. And if there were any
doubt on this subject it may be cleared by the
word in the statute "declaring the same"

P^t Clauses no devise shall be revoked otherwise
by some other will or codicil or other writing declaring
the same — In this part the st seems to be only declar. for 632. 37
a copy of what the law before was except that the
word, will or codicil in this first branch are
construed to mean a will or codicil made
as the st of devises requires a will or codicil
to be made viz that the devise or codicil to
revoke sh^t be attested by three witnesses signing
in the presence of the testator. —

(159) Revocations

Devises.

But the instrument contemplated in the 3^d clause of the revoking part is construed to be an instrument not required by the devising clause in the st of frauds. for this clause of property requires something diff from what is required in the devising clause. viz that it shall be signed by the testator in the presence of the testator witness instead of being signed by the witnesses in the presence of the testator.

1 Vesey 7. & devin to the testators heir at law ante 93. 151 if executed according to the revoking clause tho' void in itself is a revocation of a former devise. This is an exception to the next rule because it does not come within the reason of the rule. For the heir can take tho' he must take by descent.

But a subseq^t disposing & revoking instrument need not comply with the first & last branch of the revoking clause. if such an instrument complies with the first branch of what he gives to the second revoking clause it will be effectual to revoke within this first branch. and effectual

Poult 632:39 as a devin being executed according to the 3 Msd 258 devising clause for the first branch of the Catt 79 revoking clause & the devising clause are construed 1 P.W.M. 843 to be the same. But such instrument will not be effectual to revoke unless it complies with the 1st clause.

Poult 647:8 An instrument intended merely to revoke, will be good if executed either according to the first or third clause. the express words of the st make it effectual in either case - 1 P.W.M. 645
Prec in Ch 460. 10 Msd 467. Poult 631.

2^d clause: tearing burning obliterating & Devises
canceling them are not affected by the st but
stand precisely as they did at common law.

Revocations effected in this manner are implied bomp 52
rescissions & therefore these acts tho' done by 1 P.M. 1840
the testator are not per se revocations but they do
merely furnish evidence of a revoking intent & 3 M. 6, 508.
such acts are revocations or not as they 4 Burr 2578.
are or are not done animis revocandi.

That where a testator cancelled a will
by mistake,

It is not necessary however to revocations 28 Ed. 1043.
of this kind that the instrument be totally Par 635.6
destroyed or annihilates the slightest
tearing or obliteration if done by the
testator with the intention of destroying
or revoking it is sufft.

And where there are duplicates of a devise 8453
if the testator destroys one of them animo 16 P.M. 346
revocandi it is sufft to destroy both for they 2 Verm 742
are both but one instrument. Rec'd in 61460
bomp 49

(163) Revocation.

Devises Revocations of this sort as they depend
1 Eq.ca 409 on the intention of the testator may come
1 P.Mu.343 only to conditional revocations. Thus when
2 Eq.ca 776 a testator supposing that a new will was
4 Pum.2575 completed began to destroy the first but
6 May.2451 being informed that the latter was not
Pm.638. complete desisted & said he was sorry that
he had obliterated the first. he died
before the second was completed & it was
held that the former was not revoked.

The parol evidence was admitted merely
to explain a presumption arising from an
extrinsic act.

Comp. 12

And a will obliterated in part by the
testator may still be good as to the residue
as where a testator devised all his estate
to A except blackacre & obliterates the exception
the devise was adjudged good.

New Property 1825.

Devised.

From what I have said concerning the drift between the 1st & 3^d branch of the working clause there will be a distinction between an instrument of revocation only and an instrument intended both to revoke a former devise & to make a new disposition of the same property.

Revocations

Now as to an instrument of revocation only. See 64718.
it will be good if it operates with either the 1st or the 3^d branch of the working clause. for the 2^d expressly makes a devise to myself revocable by either of these drift ways.

But on the other hand it is a rule that 3 Mod 25^t if the subject instrument is intended both as an ^{en t'y} disposing & revoking instrument it will not 19 Mth 343³ revoke the former instrument unless it contains ^{the int'y} to the first ^{branch} of the working clause no 3 Mod 25^t is the same in construction as the devising 20th 372 clause. The reason is that when the instrument (Egret 40) is intended both to revoke & dispose the intention of the testator is supposed to be to take only from the devise in the former instrument what he gives by the latter instrument to the latter devise --

(165)

Devices Revocations,

The result then of this distinction is this -

If a testator intends in the second instrument to revoke & nothing more, he may make it effectual for that purpose either by complying with the 1st or 3^d branch of the revoking clause.

But if his object is both to revoke & despose in the latter instrument he cannot make the instrument effectual to either of those purposes without complying with the 1st branch of the revoking clause.

In Great Britain there is no Act on the subject of revocations, probably the common law rules would apply as to revocation.

and it appears proper for our Act to adopt with respect to deriving the maxim ex legemine quo ligatur solvatur - We now have a Stat similar to the English - St C 2. 9

Republication

A devin the revoked or not destroyed by Devise
 may be revived by republication. for being Pro 682
 in butatory it may as well be confirmed
 is a subject as to be revoked by a subject act.
 The revocation may itself be revoked & then the

(168) And before it of powers part declarations
 are suff for the purpose of republication. to Roll 118
 at com^t law the slightest word might be construed Pro 682 &
 into a republication. & slight acts had the Pro 143.
 same effect. - any thing wht amounted Pro 682 &
 to an acknowledgement of the will as an
existing valid will was a republication.

Where a man said that he after purchase Pro 682 &
 lands wh^t go when his other lands went. this was held 2 Nov 269
 a republication of a will wht contained the expression Pro 683
 "all my land" Said when a man had made his will Pro 2 Nov 269
 said "my will is in a box in my chamber" Pro 683.
 not considered as a republication

Any act subseq^t to a devin made Pro 683 &
 showing an intent that the devin sh^t remain Pro 684 &
 in force was construed into a republication.

If a man having devised his estate made Pro 682 &
 a subseq^t feoffment to the use of his will to an 1 Roll 687
 held that the feoffment was both a revocation Com^t 130
 & a republication of the will.

(170) Republication at C.S.

Devises

84

But the subject appointment of a new exec or the giving of a legacy or both did not amount to a republication of a devise for those acts relate to the personality only.

3 Atk 101 And it was held that the new
Don 2 582 ^{annexation} ~~addition~~ of a codicil taking no notice
657. 673. of an original devise was a republication
668. ^{since the} the codicil relates to the personality only.
3 P.M. 168. The codicil is a recognition of the will
2 Wm 200. as an existing will,
6 ro 649. This opinion is however contradicted &c
1 Adel 618. is held that if the codicil annexed to a
1 Eq:ca 406 prior devise relates only to personal property that
1 Ws 415 this codicil does not republish the prior
2 m 488. devise. but the former opinion appears to
be better supported than the latter.

6 ro 2 581 of codicils whether annexed or not if it
9 mod 8. expressly republishes the former devise the will
1 Ws 443. be a legal republication or if it clearly relates
3 P.M. 229 to the subject matter of the will. reasoning that the devise
1 Corp 158. contemplates that as his will at the time of making the codicil
1 Pm 658. 11 And it seems that any words in a codicil
1 Ws 485 showing an intent to confirm a prior
5442. devise will republish the devise. Then an
1 Pm 582. 11.8 rule of the C.S. & supposed a codicil to
not executed according to the Stat. of
fr 20 d.

Repubⁿ under the Stat^l 1774

But since the St^t of frauds the question of Devises
republication stands on deft arounds the St^t
is observable that nothing is said either in Wm³ 39
the English St or our own on the subject of Comb 84
republication. But as a republication is Pow⁶ 661
precisely the same as making a new devise 680:2. 686
it is held that the republication must 17es 4403
be executed precisely like a devise viz be q. mod. 75.
Signed by the testator & attested in his presence
sc. sc.

Parole publications are therefore now
at an end both in Eng^o & here

Mr Pow^t says that no court can admit a Pow⁶ 64
republication unless it is signed by the testator in Compl 381
the presence of three witnesses. Now if he means that Coll^l 68.
the republication must be in the presence of three Wm³ 440
witnesses he is correct. but there is no authority, Compl 160
that the signing of the testator sh^t be in the presence
of the testator. the authorities indeed say that the
signing was in the presence of the testator but the
republication w^t undoubtedly have been good had
the witness signed in the testator's presence tho' the
testator had not signed in the presence of the witness.

We have in this State no St on republication
but our Ct have determined that a parol D^r by day^o
republication was not sufft. & on the same grounds 800.
that it has been so determined in Eng^o viz that a republication Root 182:3.
is in effect making a new devise that it ought to be executed
as the St of frauds requires the devise itself to be executed.

Pon 666.7 In the case of the act of frauds does
not extend to implied republishations but only
586.7.593. to express republishations. Thus if a testator revives
impliedly revoking a prior devise is itself revoked
the prior devise if remaining stands. W. Pon.
says that the prior devise is republished but
it is not republished so as to carry after
purchased lands &c, 'Stearnes Real actions'

Ver 489 Under the act no express words of republication
Pon 663.4 are necessary. thus if a testator makes a codicil
668. and says 'I desire that this codicil may be a further
part of my will' this amounts to a republication
for it acknowledges the existence of his will at the
time of the codicil made

Ver 485. And it seems that any codicil tho' not actually
738. 14th January 1844 & disposing only of personal property and
30. May 1848. to an implied revocation of executed according to
116. 1st April 1848 the devising clause for this attestation by 3 witnesses is
7. Dec 1858. wholly unnecessary for the purpose of disposing of personal
2. Jan 1861. property & therefore the intention is clear that the
1. Aug 1869. testator intended the codicil as a republication of
Am 6571 the will. (vide ante)

Pon 679.681
Cope 530.158 The precise effect of a republication is virtually
1.32 193.204. to give the devise a new date so that after republi-
cation the devise will comprehend all such property
4.28.601. & all such persons as it w^t has comprehended had
2. 4.28.823. the devise been made at the time of republication
1. 11. 1860. hence if I make a devise to day tomorrow purchases
5. Nov 225. new lands & day after tomorrow republishes this devise
Billes 297 the lands subseq^t purchased will hap if two w^ts
July 644. of the devise are suff^tly comprehensive. i.e. l
1. Oct 581. general rule that wills are to be construed according
to the state of things and the testator's intention at
the time of making & republishing is a new making

And hence if one desires all his lands & afterwards purchases other lands & republishes the devise will carry the after purchased lands. & the same if the devise were of all the lands which own in A & the testator afterwards purchases other lands in A & then republishes the. 178.204.

6o.649
Comp. 651
Nov. 674
Yellow
178.442
7th 649
178.204.

On the same principle if one desires to his son A 179.275 who dies & afterwards has another son to whom 3 Feb 647 he gives the name of A & then republishes the 5.6.68 second son of the name of A will take. but if Son 178.195. the devise had not been republished the second son 178.195. A could not have taken.

But the republication of a devise can extend no further than to give the word of the devise the same operation that they would have had if they had been written at the time of republication. 178.676.84

Thus a devise of black acre, then purchased & then republished, the farm &c can not pass.

Hence also was used in the original devise Nov. 343. as words of limitation can not by a repub. be made to operate as words of purchase. hence Rec. in 649 if one devises to A & the heirs of his body & if A Ray. 408. dies before the testator & after A's death the devise is republished the heir of the body of A Doug. 337 178.676.84 cannot take under the devise thus republished. 178.207. for if the devise had been originally made at the 2. do. 333. 313 time of the repub. to A & the heirs of his body the 3. do. 313. devise w^t have been void as being to a dead man.

For devices real estate to his son & gives a leg.
 3 Mod 311. to his grandson of the same name. after the
 Wentz 340 death of the son the testator republishes his devise
 Aug 248. the grandson cannot take tho a grandson will
 2 Cor 24. sometimes take under the denomination of son yet how
 the testator by giving the legacy to his grandson has
 shown that he intended to use the word son in its
 proper sense.

Re in Ch 271 & codicil cannot give to a devise any inherent
 2 Ann 577 validity wht it did not before prop. the effect of
 2 Will 35. a codicil in republishing a devise is to set up the
 Com 6174. original devise in the same plight in wht it stood
 3 M.R. 242 at its inception. If therefore an original devise
 2 Ann 554. is not executed according to the Stat., the codicil
 that properly executed cannot make the original
 devise good. for a codicil is relative & only
 affects any original complete instrument.
 1 Ann 579. This rule however is diff. when an entire original
 2 Will 232. devise is executed at diff. times. if the latter is
 duly executed the whole devise is good.

2. 4 T. 573. Mr. Hardwicke held that if a person desired
 2 Will 535. thus to devise all the lands which he now holds & afterwards
 republishing the will after having, unexecuted
 lease. that the unexecuted lease w^t? not pass. sed
 vacare.

1 Rec 589 & devise may be republished by mere recogni-
 1 Sid. 162 tion & such a reexecution may supply a want
 2 Will 66. of capacity wht existed at the time of the first
 execution. as well as a want of subject matter
 wherein the devise might operate.

A reexecution consists in the testator designating
 no new executors. & a new attestation of witnesses.

Jurisdiction of Courts

The ecclesiastical bts in Eng^t have no jurisdiction over devises of real property tho' they have the entire 3 Act 63 & 3
jurisdiction of wills of personal property & where a testator's
will is only of real estate if they attempt to prove his Chancery 37 &
a C^t - Chancery will interfere & prevent them. - 2 East 557.
Bac 638.

Now we have nothing to do with Ecclesiastical
bts here, but our bts of probate are precisely
what the ecclesiastical bts are in Eng^t.

If the will contains a disposition of real 2 East 557. 8.
& personal property the eccl^t & may prove the Com 63 & 10.
will it is conclusive only as to the personal property. Bac 396
3 Atk 526
Ra 66.9. 8623.

In this st however devises as well as wills are
proved in a C^t of probate & the probate is
conclusive both in relation to the realty &
personalty if not appealed from.

There lies universally an appeal from Comt.
the probate & to the Supr C^t in the county where the Atk 526 cl 536
probate is held.

But the probate when finally settled
is perfectly conclusive in all questions concerning
the execution of the devise.

Now in Eng^t a C^t of bty can never set aside a 1. 637
will on acc^t of fraud etc. but this question is ~~equally~~
only in a C^t of law on an issue devised without 2. 1637
for if obtained by fraud it is no devise 2. Atk 526 cl 522
2. Atk 526 cl 522
Recia 6123
Teg 1637
I Do 721

(180) Jurisdiction

Devises. Now this rule is precisely the reverse of the case of
2 P.M. 1770 a devise for money fraud in a deed except in the cases
Par 1792 when it is to be tried in equity.

The reason of the distinction is that a devise
obtained by any sort of fraud is void, but a deed
obtained by fraud is still a deed unless the fraud
is in the execution, & it is still a deed at law.

178. 1744 Again whether the testata is componemtis or
1792. ademption to be tried at law, being a question
of fact for a jury. & this is
1793. 1794. 1795.

4 Feb 109. But the Eq: can not set aside a devise for fraud
Par 1796. yet equity can take from a devise the benefit of
1797. a devise fraudulently procured on a trust, or in
2 Nov 1799. every way procured on a trust, but this is giving
effect to the devise, for this treat the devise as a
device but as devise in trust for another.

Equity in this proceeding acts in virtue of its jurisdiction over trusts.

Eg: gr. A agreed with B the testata to give
B £1000 provided I would devise to a certain land a
paid B £1000 but the notes were forged. B devised the
land to C. & the C. decreed that it shd. quit claim
to the heir at law of A.

Dec 1798. In a similar principle if one being abt to provide
Par 1797. by devise for younger children & is dissuaded by the b/s
promising to make the same provision a bt of Equity
concludes the heir as trustee to the younger children

Such evidence was here admitted to prove
act fraud.

In a good construction ~~accordance~~ ^{accordance} on the words of the devise as to be determined at law

But where there are doubtful circumstances ^{3D Mys 249} requiring the interpretation of the letter of charity that Dev. 699
to will construe the will as but misnomer circumstances
exists that it has no original suggestion on the
construction.

The best proof of a devise is the original instrument ^{Prob. 698}
itself & the best evidence is regularly required in all ^{2d Feb 35.71}
cases & therefore where one claiming under a devise instead ^{1st Feb 117}
of producing the original instrument & proving it produces ^{Mem 6395.}
a bill in chancery by the heir acknowledging & stating
the devise, it was held that the bill was suff evidence.

And the exemplification of the devise under ^{Mem 646}
the great seal is not evidence in an action of eject ^{Prob. 702}
by the devisee agt. the heir. i.e. it is not regularly good
evidence. Exemplification is an her a copy.

The probate of a will in ecclesiastical Cts is ^{Mem 6246.}
no evidence in a C^t of justice as regards real prop ^{Prob. 703}

And even if the will is lost such probate ^{Prob. 703}
is not evidence as regards the real property. ^{2d Ray 732.44}
the copy of it from the ecc^t & sworn to may
be evidence, but the probate is not.

Mr. Pow^t indeed says that when the will is lost the Prob. 706.7
probate accompanied with other circumstances may
be suff evidence see quer.

(182)

Devise. But when neither party to a suit has a right to the
Adm^r 7/25 possession of the devise a copy is suff^e evidence ex
4 Adm^r 295.8 nece^pitate rai. On this principle Capt. Amelius
25. will was proved by copy. Fairfield County.

Pon 705.

1 Adm^r 117 And it seems too that if a devise remains in
Chancery by order of Court, a copy will be admitted
as evidence. but this rule has no application
in this state. ~~that~~ however is the constant practice
in the Co^r of this state to receive a copy in evidence
when the devise is retained in a Co^r of Probate ~~unless~~ unless
the execution is denied.

Pon 705.

If proof of the attestation is required it must
be proved by one or more of the subscribing witnesses
~~if~~ living. but if they are dead the hand writing
of the witness must be proved by the original
device.

1 P.M. 744

In a trial at law however one of the subscri^b
2 Stra 1254 witness is suff^e if he testifies all that the law
Pon 708. requires to be proved. but he must be able to
718. 70. testify that the testator signs. that all the
witnesses subscribed in the presence of the testator.

But the meaning of this rule is that the testimony
of one is suff^e to let in the will to be read
to the jury but the jury may believe or not believe
this witness as circumstances require.

Adm^r 742

And when all the witnesses are present in Court is
King 413. not necessary in law that all shall testify to the
Pia 709. signing ^{and} saying &c. of the testator. they must all
8/5/5. subscribe indeed but they need not all testify to
Pia 2224 every necessary fact. And indeed if all shall
Pia 704. testify, leg^e the will may still be established
by other witnesses.

It is clear then that the testimony of subscribing
witnesses is not conclusive either for or agt. the devise. ^{Buller 264}

Stran. 56

Pa. 711.

136 & 365.

There prevails in Engl^t a practice of proving devises in
Chancery. It is therefore frequent in Engl^t to obtain a
probate of the will in a C^t of Chancery, as a will
of personal prop^{ty} is proved in the ecclesiastical C^ts.

This probate is conclusive upon all persons whatever.
& it precludes the possibility of disputing the execution¹ Will 216
of the devise in any C^t whatever. What interest² Pou. 718
the devise takes. Whether the devise is void as being
contrary to law &c & indeed every thing arising from
the face of instrument may be contested in law.-

This proceeding is wholly unknown to this state.
Chancery has nothing to do with the proof of a will
here. These C^ts of probate prove wills & an appear-
ance to a sup^t C^t.

But in Engl^t Chancery will never grant probate 24th no
& a devise unless the heir is forthcoming. Pou. 714

C^t of law can try the devise in an action
between A & B. wherever the heir may be. but this
trial of the devise is not conclusive -

This formal probate by a C^t of Chancery is
never necessary. the devisee may bring ejectment 3 P.M. 192
agt. the heir & prove the execution³ of the will Pou. 715.
& recover. but this proof of a will is conclusive
only between the parties themselves & their represent-
quoad that part is also subject matter in dispute.

3 Atk 27
Pou 6718.

If a devise is brought in equity to grant probate of a will & the testator being in the country & not appearing probate is not granted pro confesso but the devise must still be regularly proved.

1 Will 216.
1 Ves 177
Pou 6718.

In the Probate of a will in Chancery is this conclusion it is an invariable practice in that to never to grant probate of a devise unless all the subscriber witnesses are present.

This rule however presupposes that the trustees that all the witnesses are alive. This indeed is a fair inference from the reason of the next rule. vide Pou 6719.

2 Ves 459
1 Atk 627
Pou 6719

And tho' one of the subscribing witnesses ~~are~~
be ^{dead} his ^{testimony} must be had or the
will not grant probate. for the C presumes
it not impossible to obtain his testimony.

The practice of our Cts of probate to accept a devise ~~proposed~~ on the testimony of one of the subscribing witnesses. if the testimony is satisfactory.

stra 961.
1 Atk 627
2 Atk 627

And it is provided in this state by Stat. that the subscribing witnesses may give in their testimony by deposition taken before a justice of the peace. And if one of the witnesses reside abroad a commission issues from the Courts here to the Courts there to take the deposition of the witness but in such case the devise must travel with the county where the witnesses.

(457)

(186)

Waste (Vol)

Waste is any destruction or spoil committed upon ~~any buildings trees or other corporeal hereditaments~~ Lott 53 to the disposition of him who has the unresisted Bl 281. 223. or reversion, in fee simple or fee tail. 5 Bac 455.

The law takes no notice of waste except when committed by a particular test. the same acts if committed by a stranger aint to ~~trespass~~ and are not called waste, distinction was formerly taken between waste & destruction but this distinction is now abolished.

Waste is either voluntary or pernicious.

Voluntary waste is a mis-feasance & implies ~~lott 53~~ a positive tort. a wrong of commission Bl 281

Pernicious is a non-feasance is a wrong of omission 5 Bac 455 Waste 63

A covenant by lessee not to do waste is broken by ^{Bl 281} ~~by~~ pernicious waste as well as by voluntary waste 5 Bac 447 Hence if the lessor covenants that if he does waste Waste B. the lessor may reenter if the lessee permits houses to decay etc the lessor may reenter. It has been decided in one case.

The rule w^t undoubtedly be the same if the covenant was not to commit waste.

(2)

36281 Whatever occasions a lasting injury to
5 Bac 457 the inheritance is waste when committed
^{made} by a lessee or particular tenant - and
466 35. indeed a stranger cannot commit waste
he may commit the same acts wh^{ch} w^{re} in
particular tenant ant to waste but in a
stranger it is trespass & not waste.

Waste in buildings.

6o Sitt 53a The demolition or burning of a house is
Bonya Dug waste. removing from a building any thing
Waste d^r annexed to it as doors &c is waste. removal
3 Bl 281. of any thing wh^{ch} may be called a fixture. 4
46o 64. waste
6o E 329.
3744.
Bac Waste 5.

6o Sitt 53a And a removal by the lessee of things
46o 64. annexed to the freehold by himself is waste
5 Bac 463. if the thing removed is a fixture - the
Wast 25. lessee has made them the property of the
lessee by affixing them to the freehold
Modern usage has relaxed this rule,

In genl nothing is waste except that wh^{ch} Buildings
 occasions a permanent injury to the inheritance b^r of 182
but if lesee to change the structure & the 1828 309
use of a building it is waste unl^p done by 311.
permissⁿ of the reversioner to even tho' the 1 Mod 94.
building sh^{ld} be made better by the change 2 Bl 282.

The reason given is that such change Comy D^g
 impairs the lessor's evidence of title - & besides Waste b^r.
 the lessee cannot have the right to make 3.2.
 such changes the lessor is presumed to wish
 to have the buildings remain as before,

If a lessee suffers a house to decay for want 6. S^t 532
 of necessary repairs is waste unl^p the lessor 2 Roll 815.
 undertakes to repair the buildings or unl^p 5 Bac 461 }
 he is expressly exempted. And the lessee is liable waste c^r }
 in this case even tho' there is no timber on
 the premises. for it is his own folly to take a
 lease of land on wh^{ch} there is no timber.

But if the lessor himself has cut all the timber Comy D^g
after the demise the lessee is not liable for not Waste d^r.
 repairing. 2 Roll 822
 5 Bac 465.

Martin.

4
Waste in
Buildings

Hob 234 The erection of a new building on the land
Hob 234 leased by the lessor is not per se waste, but
5 Bac 466 if he takes the timber of the demised land for
marks of building the house or for repairing it is waste
Cruic 18.1 2 Rot 815. Exce. on mod. N.Y.

Code 53(a) contd

Hob 234 But if lessor having erected such a building
Co Litt 53a suffers it to decay he is guilty of waste for
comy day he has made it part of the freehold.
Waste d2

Hob 234 If the lessor erects a new building on the
land leased the lessor is ^{not} liable if he suffers
it to decay for it is not parcel of the
demise. The lessor cannot by his own act
impose a new building on the lessee.

Waste and

If land is leased with a building upon it Buildings
 & the building is uncovered at the time of Co. 53.
 the lease made the lessee is not bound to Connyngham
 prevent the decay by covering it. for he is Waite d^r
 not bound to put the house in better condition Bac H61.
 that it was at the time of the demise which
 he must do if he covers it.

At com: law the burning of a house by AB 281.
 accident was waste in the lessee but now 5 Bac H62.
by custom. he is excused for an accidental waste or
 burning if the lessee is in no fault. We
 have no such st but our br w^r probably adopt
 the reason of the English & t.

And the lessee is never liable for any Connyngham
 injury wh^r is inevitable as by the act of Waste 25.
God. of public enemies. or by the act of Co. 53
 the lessor himself. This is neither voluntary Bac abr
 nor purp^r — Hart 16. 464. 474.
2 Bl 281.

(6) Waste in
Land.

But if a house thus insured is left standing
1. to 137.b and is capable of repair the lessor must
cause & repair it in reasonable time or he is
Waste 5. guilty of permitting waste as if the house is struck
by lightening & partly consumed
5 See 484.

Do suppose the lessor in such case covenants to
repair with an express exception of casualty by
fire. Would he then be bound to repair?

(7)

If a tenant commits or suffers waste but
repairs the building before action, brought
the action cannot be maintained but
in this case, if in case of committing a
permitting waste the lessor may not take
timber from the land for the purpose of repairing,
for he has the right to take timber & repair for the
purpose of preventing waste but not for repairing
injuries already committed or permitted. — For
here the repairs in whole or in part are
the necessary by default of lessor
land.

Conyndig Digging & carrying away soil is waste. taking
Waste 24 away a dam or wall whi was intended to
2 Roll 16. protect the land from overflowing of the
b. sitt 55.w land is overflowed in consequence the tenant
5 See 488. is guilty of waste. same of permitting the
Conyndig wall to decay. And if the wall is carried
Waste 25 away by tempest to the lessor must repair it
in reasonable time or he will be liable for any
damage which arises from its loss. —

Bad husbandry is not of course waste tho' Trees.
 It may amount to waste for in general it is an injury. 2 Roll 814
 to the leaze & not to the remainder manor - 5 Bac 458.
 But the conversion of one species of land into another is waste as if arable is changed into meadow or pasture & vice versa. This is called change of husbandry Conyngham 53.6.
 waste because it changes the course of husbandry. Besides in Engle. it changes the identity of the land. 2 Bl 282.
 This rule probably does not hold in this state or in this country. Any change however which would be a permanent injury to the inheritance, must be waste here.

If tenant opens a new mine upon the land 5 Co 12.
 he is guilty of waste unless the mines were lawfully devised for he is presumed to take the land for husbandry. but if the lease of land on which a mine is opened the lessor of course may work the mine unless especially restrained by the lease for when a mine is open it is presumed to be a part of the consideration which induced the lessor to take the land.

Trees.

If tenant cuts down timber trees except for his inheritance. and if he does any act in consequence of which he tops them so as to make them decay or if he suffers the timber to decay he is guilty of waste as if he suffered the fence to be out of repair so that cattle damage the trees &c

9)

Haste in
Trees.

Timber trees are such as are fit to be used
in building.

2 Bl 281.
1 Roll 649

5 Bact 459

4 Bl 219 But trees not timber may be the subject of
Co Litt 253a waste as ornamental trees or trees used for
Co Litt 55a shade the land & like calls destruction. These
Commons are important parts of the inheritance
written 15.

I g trust that there is a material difference
between law with respect to cutting timber in
Engl^t & the law here especially in wild lands
& in the case of dowers & courtesy. indeed it
was once decided in Court that in such a case
the widow might cut timber. It is a great
object in Engl^t to preserve the timber but
in Court & in genl in the US it is not
so.

As to what particular kinds of trees are to be considered as timber. Oak ash & elm of the age of 20 are
Co Litt 281 timber throughout the realm but usage makes
Co Litt 55 other trees timber. But in our country what
Commons trees are to be regarded as timber must depend
Master 15. upon usage & the trees will the country produce.

But pine chestnut cedar locust &c are in
Court timber so perhaps hemlock

Maderwood does not come within the denomi- Pices.
 nation of timber & thus it is said the tenant 286282
 may cut at his pleasure if he does it at a 17R 146
proper season. (unless restrain'd by the terms of etc.) 286459
 It may be cut it for the purpose of selling it? 817.
 28635. £283—

The tent for life or years is entitled of common 28635.
 right to such wood growing on the land as is 282.
 necessary for fuel, repairing houses fences, &c. & 6o Ltt 51.
 these are called Stoves. — & for making a for 6o E 604.
 repairing instruments of husbandry. 6o Ltt 41.
 Bac Waitz.

But after tent has suffered a building to become 6o Ltt 501
 ruinous for want of repair he cannot afterwards 5 Bac 466 }
 take timber off from the estate devised to repair Waste of
 this building. (Vide ante) For he has already
 been guilty of waste & may not take lepois
 timber to repair his own wrong.

Erection of a new building by lepee is not Comyn d
 of itself waste but if he takes lepois timber Waste 15
 for that purpose he is liable for waste. more
 or if he takes lepois timber to repair it. (ante)
 or if he makes a fence where there was
 none before with lepois timber.

(11)
Waste in

Trees.

Abt

If tenant cuts timber for repairs which are not necessary or which are necessary this his neglect is a quicke of waste. (ante)

Abt.

If tenant cuts timber & sells it that he may apply the proceeds to making repairs he is guilty of waste. The law requires him to apply the timber to the repairs otherwise the tent might speculate.

comyng Day When the lessee covenants to make all necessary repairs
Waste d^r 5. at his own charges he is still entitled to timber from the estate for the right of cutting timber
to make repairs is so closely incident to his
estate that it cannot be taken away except by
express words.

comyng Day And the tenant may in many cases cut
timber for repairs tho' he is not ^{to make} obliged these
Waste d^r 5. repairs, thus if lessee covenants that he will make
repairs the lessor is still at liberty to cut timber
& make the repairs himself if it becomes necessary.
For the policy of the law favours the repair
of buildings,

(12)

Miscellaneous Waste

And where the word are 'with impeachment
for waste' still tho' not bound to repair he / It
may take timber from the land & repair. 2 Roll 682213.

So if a building was ruinous
the less tho' not obliged to repair may
take the timber of the estate & make the
repair

The destruction of fruit trees in the garden or Co Att 53a
orchard is waste but not so if the fruit trees Conqu'd
is not in a garden or orchard. as in the woods Waste 13.3
or in the open field. 2 Roll 817

Miscellaneous waste.

The destruction of a common fence is not per se 5 Bach 461
waste but in its consequence it may be waste Waste 14.
as if tenant destroy a fence & in consequence
cattle sh^t in the trees. So the breaking down
of a stone wall is waste, per se. But
the breaking down of a common wood fence
is s^t not to be a permanent injury.

But destruction of a park fence is waste. so
suffering it to decay. 6 mo 14
W.L.3
Co Att 53.
24 Econ 8222

But any thing wh^t might amount to waste is w^t hoy 4
not waste unless it amounts to 40 pence !!!
de minimis &c. 6 mo 14
Conqu'd
Waste 1
Co Att 53.
2 Roll 824
2 Bl 228.

(14)
Waste in general

no person can be guilty of waste where the land on which the injury is done is not part of the demise. Rerap is here the only remedy.

Waste &c. for the action waste arises out of the privy of estate between lessor & lessee &c.

Common by
Waste &c.
C. of 216.
2 Bl 283.

Where a lease is made with impeachment of waste the tenant is not liable for any waste however extravagant. but in such case a ~~C. of~~ equity will interfere and prevent wanton waste by injunction.

Common by
Waste &c.
1 Roll 183.

But this exemption from liability to waste can only be created by deed & to constitute a bar to the action of waste the clause must be in the deed. for if in a separate deed the lessor covenants not to sue the lessee for waste he may sue & recover & the lessor may have his remedy by a suit on the covenant waste covenant broken.

Common by
Waste &c.
1 Roll 180

If tenant in tail makes a lease with impeachment for waste the clause does not bind the spouse in tail over the spouse in tail who confirms the lease by accepting rent. & even by accepting rent after waste committed, for the next spouse has an interest.

Who can maintain this action

The lessor is not liable for any waste occasioned either directly or indirectly by the lessee as if Community lessor cuts all the timber & the lessee suffers building Waste 24 to decay, he is not guilty of waste. ^{Cantab.} 2 Roll 822 so if lessor destroys a fence & by this his trees are injured,

so where the injury is occasioned by the act of God or of public enemies. ^(ante)

10 Co 139
Community
Waste 25
Co Litt 53a

Who may maintain this action.

By the ancient common law there was a writ 1890/05. springing from a C of law to restrain waste but 121. this writ is now taken away by Statute.

The action must be brought by him who has 0. Litt 53a the immediate reversion or remainder in fee 285 simple or fee tail. if there must be no 3. R. 287 intervening freehold between the estate of the Stat 110. tenant in possession & the Pif in this action. Community Hence to a full life remainder to B for life rem^t. Waste 223. to C in fee. C cannot maintain this action for waste ag^t A. if B. is alive. in such case the 56077 remainder man has no remedy except in Co Litt 51a Chancery. sed in n^t not a simple act^t on the 286167. case for damages lit. 1 John 5t.

(18)

Who can maintain this action - Waste,

If the intervening estate is only for years
the remainder man may recover for the
comynd term for years does not need to be supported.
Waste c3. by the freehold before it.

Same if the first estate was for term
of years. And in case of the intervening
estate being term for years the lessee of the term
will enjoy the estate notwithstanding the forfeiture
by the first tenant & the entry &c by the remainder
man in fee.

comynd
Waste c2
Allen 87

If an intermediate estate for life is limited
on a condition precedent & the first tenant
commits waste before the intermediate estate
has vested in interest, the reversioner may
sue the first tenant for waste, but if the
estate was already vested this could not
be done for tho' the law will allow a contingent
interest to be defeated yet not a vested inst^t

60 It is said And it is suffice to this pt that the def has
56076 the immediate estate of inheritance at the
comynd time of action brought tho' he did not have
Waste c2 it at the time of the waste committed.

For it cannot now be objected that any one will
be injured by the remainder mans recovery,

(20)

The action lies by one & tenant of another
 in virtue of the Statute of West 2nd ride Conq L 15
 It tenants. tenants in common & Waste 22

And at C² if one tent in common & 3.86227
 leases to his companion & the latter commits waste the former may maintain waste & 2.8643.194
 recover a moiety.

He who has the immediate inheritance may 6.2.11.53(6)
 join in this action with ^{one} who has a smaller 4.2 a
 interest thus limitation or for life remainder & Conq L 20
 & to the heir of S. 6 may join with S tho' Waste 2
 S has not any estate larger than a less estate. 2.2.25.
 So if S could sue alone he w^t have a sole seignior
 & the defeat C's estate.

(21)

S^t holds for years & commits waste & his term 6.2.11.283a
 expires before action brought the lessee may 285a.
 still maintain an action for damage but 5.6.114.
 he cannot recover the place wasted even tho' 6.9.6.8.
 the lessee holds over in this case his remedy
 is ejectment

- & it is common law the grantee of the uses
3. & 158 since or remainder man could not maintain
b. letter. this action for the condition not to
bro fac. 445. common waste is personal. and there is no.

privy of estate between the grantee of the reversion & the tenant.
But now the grantee after having given
notice to the particular tenant may main-
tain this action by 32. H. 8th.

sed in is not waste a tent & is it not as much
an injury to the grantee as before the transfer
it was to the first reversioner - If the
action was founded on contract there might
be some reason -

Co L 54(a)
316(a)
3 Co 23(b)
Bac Ab
waste(h)
Fitz 56

* But in this case if the heir signs his
reversion the grantee of the heir may
maintain waste ag^t the signace of the
ten^t in down,

24) Against Pahon waste lies?

But the action lies by construction of these
Co. Litt 54a unconsent statutes agt an occupant either
3. Nod 93. common or special. For he is strictly
Conquig tent for life & therefore within these Statutes
Waste c. 4.

(b) The action lies also agt an Esq'r or administrator
who take a term for years as ap'ty. for waste
done by themselves for they are ap'iges, but
not for waste done by their testator orule
tate. This action will also lie agt an
Esq'r de son tort. — (vide post).

Conquig If lesee to commit waste & then signs his
Waste c. 4 interest the lessor may maintain this action
2. Roll 829 agt the lesee, & recover not only for damage
but for the term itself because the right of
action was complete immediately after the waste
& he cannot by his own act devest a
right of action existing in another.

2. R. 821 If a stranger commits what w^e be waste in
Conquig tenant fr bps to the lesee is liable for the
Waste c. 4. waste & may indemnify himself by an action
Co. Litt 54a of trespass agt the wrong doer. This holds also
3. Syc 474 a to tent by courtesy & in dower on the
3. Ser 209 ground of negligence in not preventing it,
5. Ser 116. 7 It is s^e in bps. that the lessor may maintain trespass on
Tity 60. the case agt the wrong doer. sed 2n — The rule is
founded on the supposition that the
lesor is remediless —

If the master holds as well up't a tent who is
an infant or feme covert for this is a
condition annexed to their estate by all
conditions infants are in full bound.

Co. Litt. 57a
Comyns Dig
Waste c. 4
5 Bac. 47 H.

And the rule is the same if the stranger
dispossesses the tent & then commits waste. i.e. 28. 6. 24
(ib.)
The tent is liable for the waste thus
committed -

If tent for life to having committed waste only Comyns Dig
the w'c'r &c cannot be sued in waste actio Waste c. 5
personalis mortua cum persona. & this hold CR. U. 828.
of tent by courtesy &c. Indeed all torts Off of Estu
as such die with the person, 127

This action does not lie agt tent in tail after Comyns Dig
possibility of issue exstinct for his estate is in Waste c. 5
its creation of inheritance no condition is 28. 25. 283.
annexed by law & he is not within these Co. Litt. 27
ancient Statutes for he is not strictly tent 28. 26.
for life but Co. of equity will restrain him from 828.
exceptive waste. Tho in this case he is not
lible to an action,

(26)

29 where waste lies.

The action does not lie ag^t lant at will
c 8C 146. Blackstone says because the consumption of
common waste ipso facto determines the estate. but
Master. confidedly he is not liable at common law nor
s 60 1. b do the Statutes of Marlbridge & Gloucester reach
bro 177. him.

734.

The remedy for the laptor at will is an action
of trespass.

But at this day what was usually called taint
at will may be liable in waste. for it will
lie ag^t lant from year to year.

27/

28 283. The action will not lie ag^t lant for larp or
29 283. years "with impeachment of waste" but a
Commons Dig. & of Eq. will by injunction prevent such lant
Master. from becoming excepted waste.

Commons Dig. Nor does this action lie ag^t lapes of such a lant
Master. for the exemption is annexed to the estate &
not to the person - so it will not lie
ag^t the apigner & for the same reason

The redress whh the common law & the
St of Malbridge gives to the lessor is only
single damage, but by the St of ~~Gloucester~~
Gloucester, the tent forfet, treble damage
and the place wasted.

2 Bl 283
Loyalty Dig
Marke fl
5 Inst 487
Westm 1

These statutes are prima facie binding here.
and yet in this state no claim has been
been made for more than single damage.

This action therefore is now a mixed action
in whh land & damages are recovered tho' at first
it was a personal action;

3 Bl 228.
17.8.

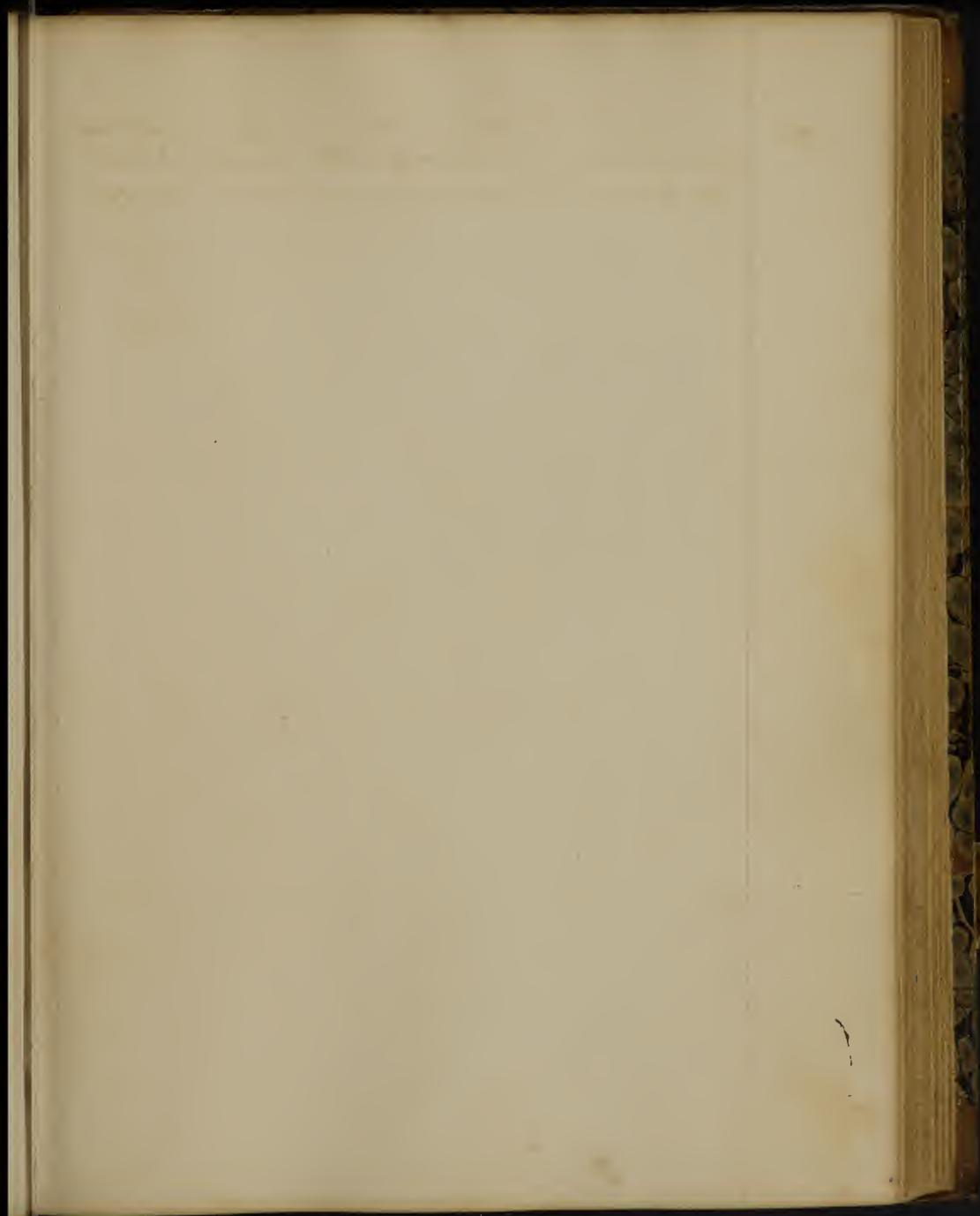
Only the particular parts of the subject in
whh the waste committed is recoverable if
the diff't parts are easily separable. but if
waste is committed sparsely over a whole
farm the whole will be recovered. — a vague rule.

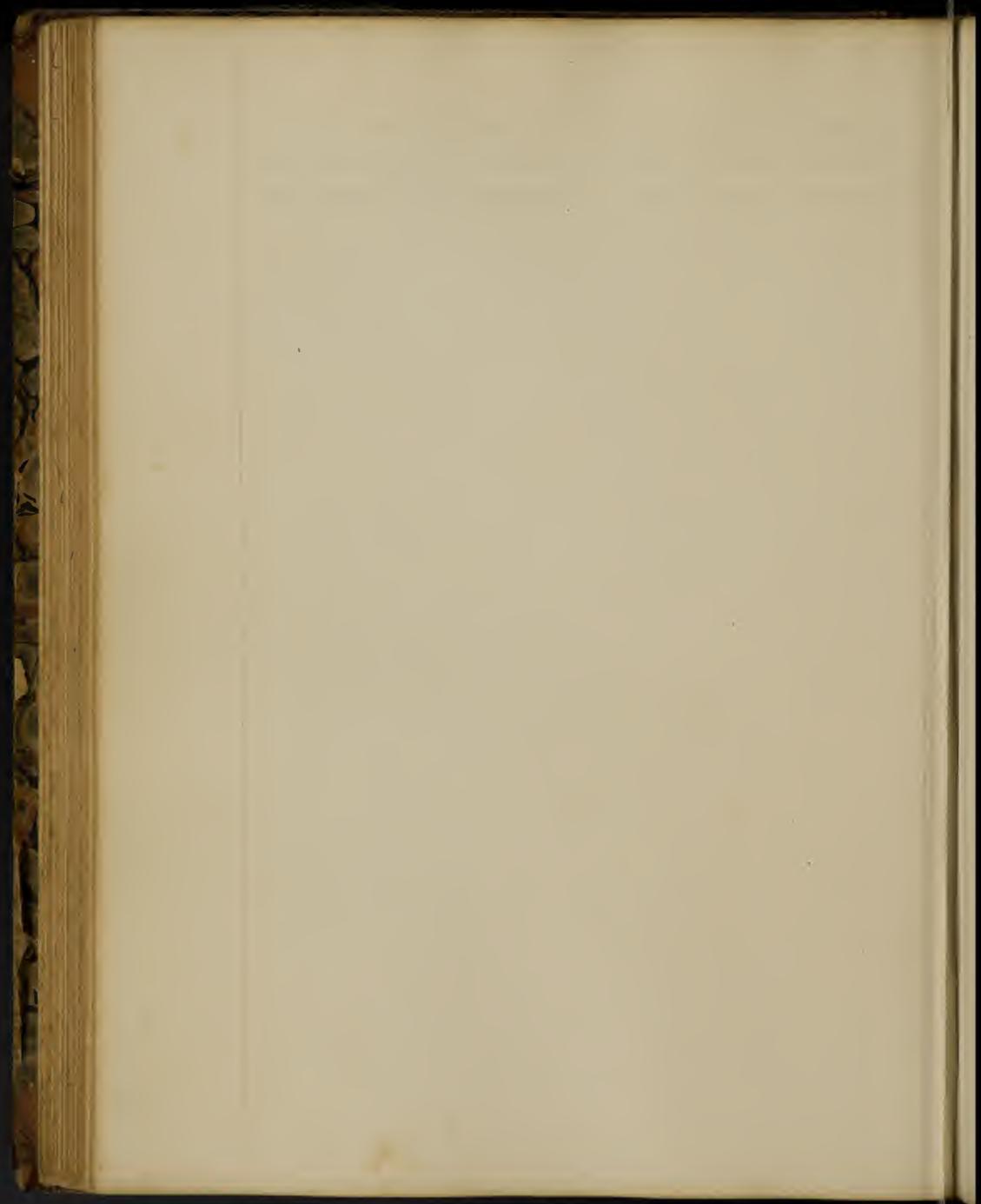
2 Bl 284
5 Inst 487

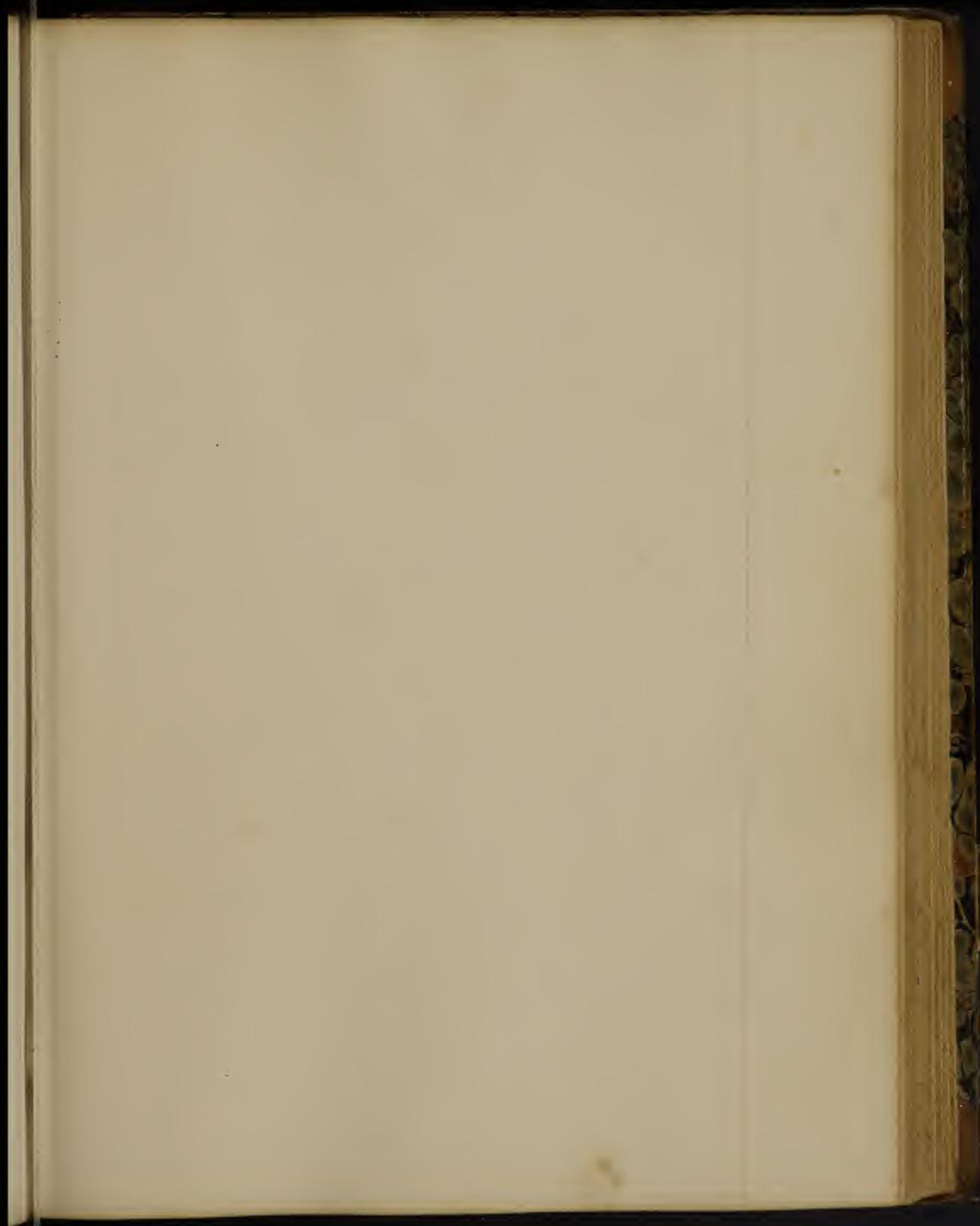
If waste is committed over a whole house
the whole is recoverable but it is said that
if waste is committed in one room of a house
only that room merely can be recovered.

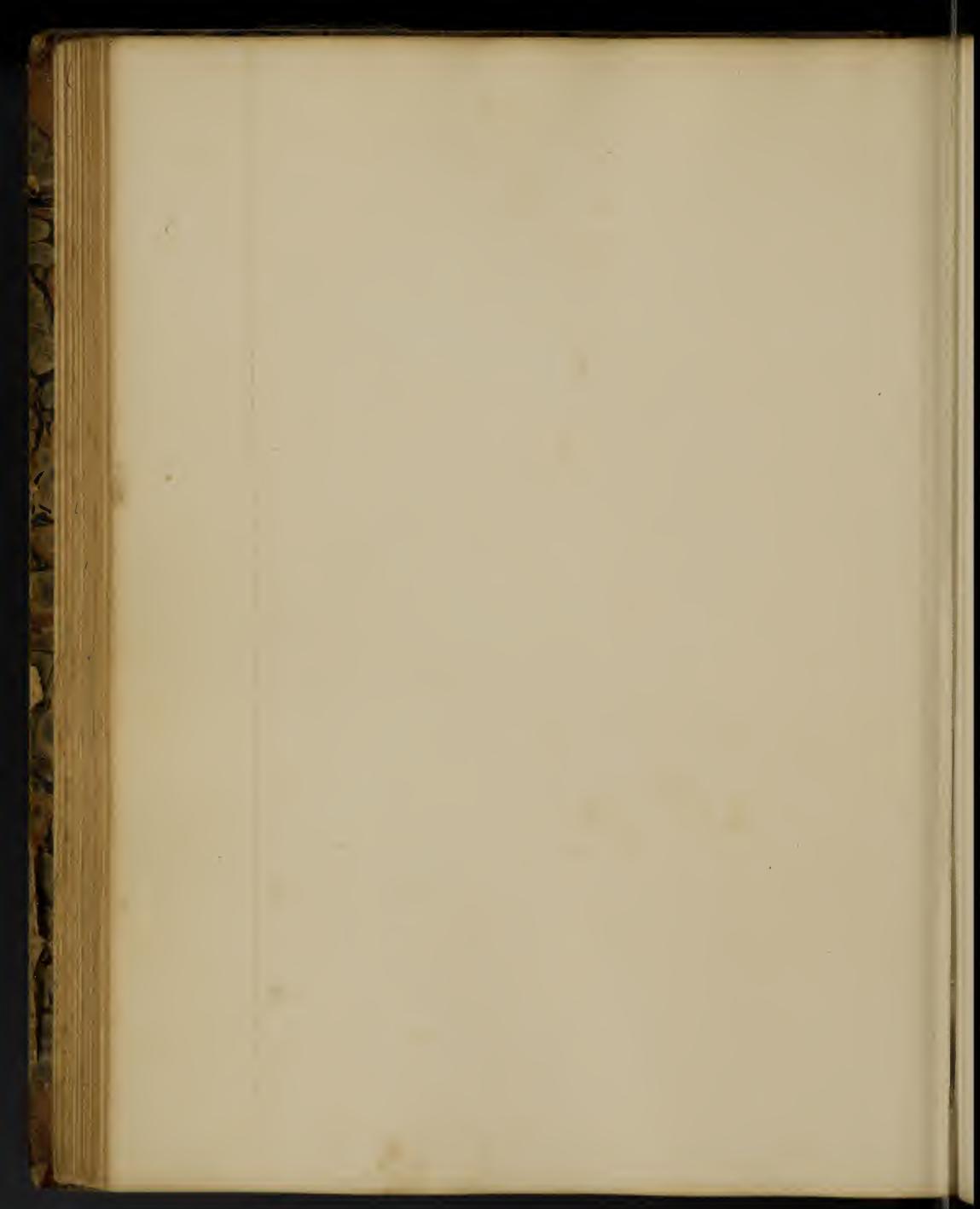
C. Litt 54a
2 Bl 284

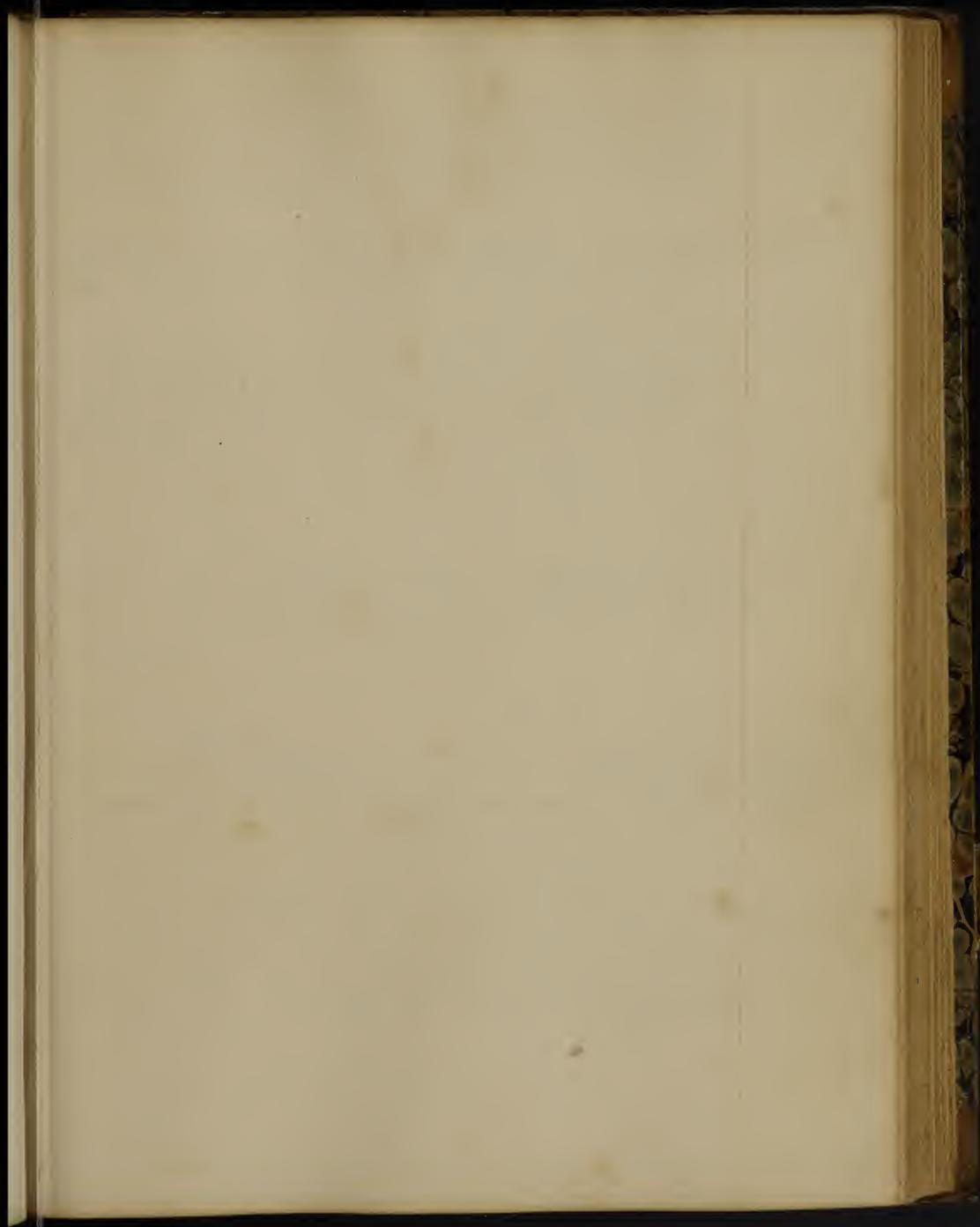
In Conn^t If tent in dower suff^s buildings
fences etc to go to decay the County Ct^t has
the power to provide a summary remedy.

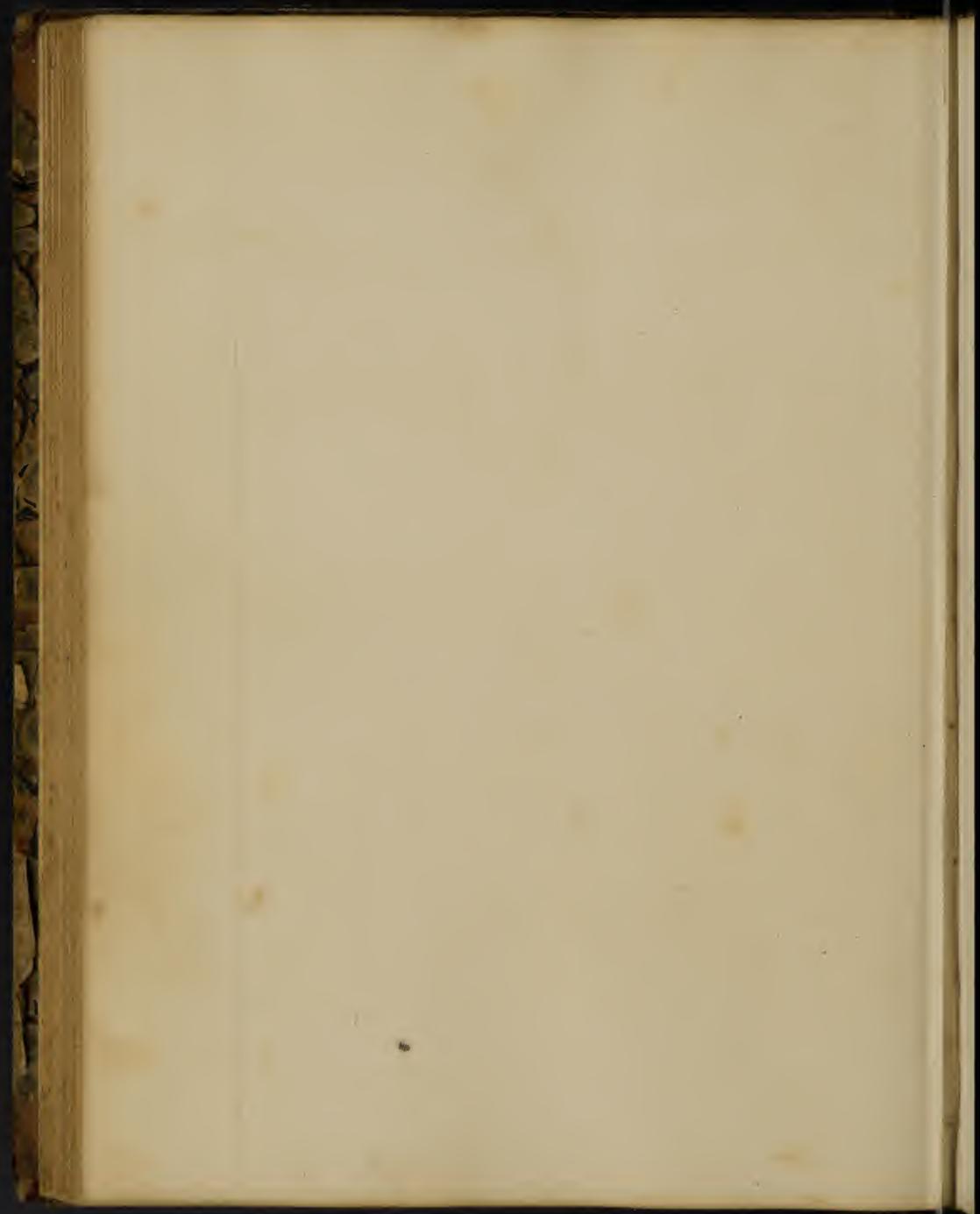












Ejectment (c. 167).

Under this title I shall treat of the English actions of
ejectment, & of our action of dispossession for real actions
vide 3 Bl Com 167-195.

Ejectment is brought to recover lands or tenements of 3 Bl Com 167-197
which the Plf has been ousted. so also is our dispossession.

Ouster is a generic term & includes both dispossession 3 Bl Com 167-197
& dispossession. Dispossession denotes ouster of a freehold
dispossession denotes ouster of an estate less than
freehold.

In the action of dispossession therefore the Plf sh^d alledg^r
that he is dispossessed in ejectment that he has been
dispossessed.

Ejectment is in form an action in wh^t a term 3 Bl Com 167
for years is recovered with damages by the lēge Espdes 427
when ousted from his possession - 9 Co 477. 5 Co 105.
Dispossession is an action by wh^t one who has been
ousted of a freehold recovers it together with
damages. the form of our ejectment & dispossession
are precisely the same the only difference between
them is that the one is brought for recovering a
term for years the other for recovering a freehold.

(57)

Ejectment, Our action of dissession is strictly a mixed Comb 68. action. the freehold and damages are recovered Comyn v. L 250 but ejectment is not either here or in Engl? strictly 3 Eliz 1599. a mixed action tho' usually so called. -
2 Selwyn

3 Eliz 1578 Anciently this action was brought as it purports
200. to be by lessee for years ag^t an actual ejector &
3 Wils 120. if lessee was ejected by a stranger he was entitled in this action to nothing but damages & the lessor was to bring a real action ag^t the ejector & then reinstate the lessee. If the lessor w^t not do this the lessee was entitled to

for the remedy of the lessee when ejected by the lessor or by a stranger claiming under a title superior to the lessor vide 2 Eliz 200. where the term c^t be recovered at least in the first of these cases but not by ejectment but by action of covenants and even now the declaration in ejectment demands in Engl^t only damages for the old form still remaining.

(58)

66 of equity afterwards interposed & compelled 2 Eliz 200. the ejector to make specific restitution of the 2 Eliz afft lessee land and finally 66 of law adopted the same method of doing justice & introduced a judge to recover the term & a writ of replevin thereupon

In this state the declaration demands restoration & quietus
of the lands & one &c have held this to be necessary 1. R. 1. 408.

From Ed 4. &c of law have given judgment for the recovery 3 Bl 200.5.
of the term & since then they give nominal damages 2 Bl 181.
only and a distinct action must be brought for
the vacant profits, which action is trespass

In Court the Pif has his election to recover
the damages in ejectment or to bring a subj^t.
action,

Since Henry 7^t this action has been almost the 3 Bl 200.5.
only method of trying the proprietary title to the 2 Barr 667.8.
freehold Bacon Abr. Eject. a.

And the declaration in ejectment is now a
train of legal fictions wh^t have been devised
for the purpose of trying in fact tho' not in form
the proprietary title to the freehold. for the fictions
vide 3 Bl 200-5. Bac Abt Geat p. 1. - - - - -

In this state these fictions are not used. If the Pif
is tenant for years he so declare, if for life he so de-
clare &c &c.

Gectmt In real actions except that of assize no damages are recovered but the pecuniary recovered only for the declaration is merely that the Pef has better right than the Dfct.

6 Dec 6.7
3 Dec 187
6 Oct 257

For what things?

Gectmt will not lie for any thing of which the shff cannot deliver actual possession on the ex't It will not therefore lie to recover incorporeal things for by possession in the rule is meant corporal possession.

3 Dec 206.

etc E 492.

2 Dec 106

Gict

Buller 49

stra 54.

Cap & Dig 427.

Edwag 784.

1 Barr 140.

Str 1004.

Cap & Dig 890.1

428.

1 Root 118.

But the action will lie for land laid out for highway in favour of the owner of the soil but the owner recovers possession subject to the easement.

Day, Def In Stiles & Wurtis one 6. determined that this action would not lie to recover pos of highway.

(61)

reclamation will lie in favour of the owner of ~~the~~ ^{present} the herbage of land merely the another owns ^{str. 1120} the soil. for the possession is in him pro temp^e. bro Car 162

Hurd 303. 401

1

But the action will not lie for a water ^{coun. Yelv. 143} so nonanic but it will lie for such a tract of ^{Popl. 167} land covered with water.

2 Bl. 18.

Ex/ D 428

And this action will lie for a certain part ^{stra 695.} of any undivided entire thing. as the half of ^{Ex/ D 428.} a house held in common

(62)

Who may maintain?

It is a gen'l rule that no one can maintain ^{3 Bl. 205. b.} reclamation unless he has at the time of being ^{Ex/ D 430} in his suit a right of entry. or what is the same thing a right of present possession ^{stra 5595. 8.} does the supposed entry of the lessor of the ^{3 Bl. 179. 80. 191.} Plf. aid him no w^t an actual entry and ^{Comb. 6.} now if he had no right of entry ^{3 Bl. 178.}

162 Who may maintain - St of Simulations
Ejectment The popestry title is the only one whch is
Sect 5595. formally tried in this action. & if one has
3 Bl 180. 190-a right of property & not the right of
Esp^t 431. possession - he cannot maintain ejectment
but he must in Eng^l resort to his real
action. Thus tenant in tail alienes, the
ipso in tail cannot maintain ejectment agt the
aliente but they must resort to their real action
for they have not the right of entry.

(63)

Esp^t 431:2 And since St 1ac 1. the labor of the plf or
3 d^r 206. those under whom he claims must have been
Buller AD 10c. in popestry within 20 yrs from the action
~~or brought if they had the right of entry during that time~~
1 Burr 119 & the labor of the plf must prove this
Rann 234. possession & the Dft need not plead the
statute.

In this state an ouster of 15 yrs has the same
effect. and after a despoilation of 15 yrs in
this state the whole statute right of
the person ousted is gone. for in this state
when the popestry title is gone the whole
title is gone. (vide post)

3 Bac 4 Both these statutes have the usual savings
bt in 1. B. vs that the stat. shall not run agt infants
feme covert, idiots, lunatics (& persons beyond
beas.) *not in our stat.) and in this state if any
person is an infant feme covert non compos or imbecile
one at the time of the occurring of their title they
& then he or she is allowed five yrs after the removal to
them several disabilities to bring their action for
a right of entry occurs at the time of
ejection

Who may maintain it - It of Simony (4)

But where the stat: has begun to run no effect, supererogatory disability will save the title & will not prevent the stat from barring it. 4 T.R. 300
Thus a testator dies leaving an heir at least 18.

law a woman of full age & another person 2 Com. R. 273 takes possession & she soon after the death ^{Banc & White} of the testator marries if she does not bring her action within 20 yrs after the testator's death she cannot maintain ejectment

Succes^s disabilities cannot be joined with ^{at least 18} the saving clause of the Statute so as to ^{at least 18} prevent the stat from attacking.

Thus a man dies leaving a female infant of 20 yrs of age & another person takes possession & she marries before it she must bring her action 5 yrs after she comes of age or her title is lost

~~Or 10 years from the time of marriage~~

Our sup: is once held contra by a divided Ct. 4 Day 298.
& judge was given one way, the decision another.
Our rule now will probably be the same as the English 2 Com. R. 273
^{Banc & White}.

(65)

The possession of the lessee of the Plf or of
Str 1142 those under whom he claims must be an
Ball 102. actual possession within 20 yrs

Eph 5432

Sal 421.

65:-

2 Ban 1241. But suppose that in this country as may
Eph 5432 frequently be the case in new lands. the lessee of
the Plf he never saw the lands until just before
the action brought & he bought the lands 50
yrs ago but no other person was in possession
until 5 yrs before action brought. can the
Plf then recover? I G thinking that he can.
in analogy to the cases of vacant possession.

In this state with doubt the right of poss.
if no other person has been in actual poss.
Sup 15. is equivalent to actual possession & here therefore
in the above case the Plf could unquestionably recover.

1 Saund 319 b - If the owner of land brings ejectment within 20
Eph 5432 yrs after ouster & is non sued this action
does not prevent the stat. from running. To
prevent the It bar. there must have been actual poss.

(26)

And an undisturbed possession for 20 yrs in
Engl^t, or 15 yrs ^{here} is not only a suff^t defense to
ejectment but is a good ground on which to
support the action of ejectment for this
possession gives a possessory title

75 R 492
3 Ban 119
Bun 2d Cases
459
Espl 432
Talc 421
Rum 5t.
Ad Ray 744.

And it has been resolved in N.Y. that a peaceable possessor of 3 yrs entitles him to an action of H. John & 211.
ejectment ag^t a mere stranger. for as between
these parties the one who has been longest in his poss.
possession has the better right if he was first in 2 R 74
74 S 573

But this rule can hold only as between one
who has been in possession & a mere stranger.
and not as between him & the real owner

The soil in a highway cannot in this state
by express statute be acquired by possession.
(after 18(3)). When there is no stat the opposite
rule must hold.

(66) In Eng^t a possession of 20 yrs only gives
3 Bl 179. 80 the peoperty title & does not affect the ultimate
190-2 right of property. So posseesion in Eng^t is necessary
Espl. Dij 447 to require right of property in lands tenements etc.

200 & 50. In this state posseesion for 15 yrs confers the
68. 151. 412. ultimate right of property

All. 19102 Accepting ousters in continuity for 15 yrs will keep
Spt. Dij 44. but the dispossessor of his title thus S. is dispossessed
4 Ban 2478. in it who continues in posseesion 5 yrs & is dispossessed
2487. by S who continues in posseesion & C & Co. A. title
keeps his property.

But in this case does C acquire a title so
that he can maintain this action agt
A. I think that C is the true owner
for A has lost his posseesion title & it must
be in some body in whom then is it? in C.
as between C & A. but as between the dispossessors
& must have the land.

(67)
5 Ban 2604 But in all these cases posseesion which bars squatment
to 195. under the Statute must be adverse. for the
3 cast 297 stat goes on the ground that the dispossessor has
2a Ray 9140 abandoned his posseesion title.
Salk 423
Spt. Dij 433.

(67)

Hence one jt tenant &c who has been in sole
possession 20 yrs cannot hold agt his jt tenant for
the possession of one jt tenant is the possession of both
some of tenants in common & coparcenry.

If mortgagor continues in possession for 20 yrs the ^{Ch. Dij. 423}
mortgagor is not barred for the possession of the ^{Ch. Dij. 423}
mortgagor is not at all adverse. ^{Ch. Ray. 1110}

3 East 4297

Bac. Eq. 283.

(68)

But an adverse possession by one of two jt tenants &c ^{Ch. Dij. 218}
will bar the other's possession title. If then one jt tenant ^{Ch. Dij. 423}
claims the whole estate in virtue of 20 yrs possession ^{5 Barr. 2604}
he must prove the possession to have been adverse ^{6 C. L. 1956}
& what in such a case is to be deemed adverse ^{Esp. Dij. 434} ^{2 Del. 112}
is a question of fact for the jury & from great ^{2 Del. 112}
length of sole possession the jury will presume that the ^{Ch. Dij. 217}
possession was adverse in that there was an ouster ^{Esp. Dij. 434}
same rule as to tenants in common & coparcenry. ^{If Tuncney. 10.}

27-8.

If then a party in possession claims under a party ^{Bull. N. 103}
out of possession no length of time will bar the ^{Esp. Dij. 423}
possession title of him out of possession thus below 1 Root 51.
for 20 or 50 yrs. the tenant at will. In this ^{68. 222.}
state it has been held that a tenant in possession ³
by permission may gain title by 15 years possession ¹¹¹
but this decision is unsupported by any principle. ^{2 Ray. 187.}

(69.)

Coupl 218. The remainder man therefore is not barred by the possession of particular tenant because during the possession of the particular tenant the reversioner has no right of entry & the statute never bars one who has no right of possession. besides the reason given for the gen'l rule on last page. is that the possession of the particular tenant is not adverse to the remainder man or reversioner.

Bull. 8 P 104. Where adverse possession is relied on by tenant at will there must be some proof of an ouster of the landlord. but if tenant at will being in poss. openly claims under ss. this is presumptive evidence of an ouster of the landlord.

(69.)

3 East 297. Possession by a stranger under claim of title is always adverse to the owner. by a stranger is here meant he who has no right at all from the owner.

Dougl 460. Where the action is brought by the lessor founded on 3 Barr 1897 a claim in the lease giving a right of entry on lessor's breach of certain conditions. the lessor had not 1 Staud 819, but actually enter before action brought. because the Bull. 8 P 103. confession of lease entry & ouster is suff. under 1 Staud 819 { the common rule.
1 Cels 818. }

1 Ventris 42, 332 { contra but not law.

Salk 240. }

Esp. Dig 466 }

and this last rule is gone where an entry is required to complete the lessor's title, but where Doug 467
entry is required to complete the rebut the title of Land 367 N^o
the debt derived from another actual entry is 287. n.
necessary. Ex grā if a limitation is made to Esp. Dec 466.
a far life remainder to B in fee & c^t forfeits 460. 6.
by aliening in fee here actual entry is necessary 3 Ban 1197.
for entry by B it has required to reive the title of c^t Bell A 9103.
2 Stra 1086.

The reason is in the former case the very breach (70)
of the condition vests the lessor's possession title
& the entry required is merely pro forma. But in
the other case B's right to take possession does not
accrue until the entry of B. for B must show that
he intends to treat the act as a forfeiture.

The only person who can maintain this action Doug 21
is he who has the legal right of possession thus Esp. Dec 435. 6
mortgagor having the legal right of possession may maintain suit 245.
this action either before or after forfeiture.
But if lands first leased to c^t and afterwards
mortgaged to B. B cannot have ejectment against
the lessee. but it was once held that the mort-
gagor might maintain eject: in such case Doug 23. 264
provided his object was merely to compel Esp. Dec 435.
the lessee to pay rent to him provided he
gives notice that this is the only object
sed contra. the rule is now well settled 87. 22.
otherwise. Montg^s 22.

(71)

Thos a mortgage debt has been fully satisfied
Doubt M 214.5 find yet if it was not paid on the day the
1 Nov 187 mortgage may maintain ejectment. for at
2 2d. 80. 187 law the legal title is in the mortgagor if
2 Day 151. the debt is not paid on the day.

2 Verm 279 1 Eq. Cas 323.

1 J. & R. 76. 36.

J. & R. 62.

17 R. 2. 122. And it is a general rule that he who has the legal
title to possession may recover in ejectment against the
Doubt 187 person who has the equitable interest. thus trustee
2 2d. 874. may recover against cestui que trust in ejectment.
1 J. & R. 760n

(72)

If a covenants to sell land to B but neglects
to execute conveyances & B goes into possession
A may recover the land in ejectment against B.
even tho' he has ~~on~~ the rec'd the purchase money.
Comp 597 Bea vs. Marshall in Couper contra but not law.
473. Doug 22. 695. 747.

2 2d. 696. Yet where the person having the equitable title
5 2d. 122. has been long in possession the C^t may instruct
7 2d. 3. 49. the jury that they may presume an extinguishment
bullet 110. of the C^t's right. as in case of satisfied mortgage
8 2d. 3.

1 2d. 622. 705 In several modern cases the Courts of law have
2 2d. 695. 6 relaxed the general rule & have taken notice of
1 4 2d. 224. trusts in the action of ejectment. but these
447. cases have been of late disapproved and given up
7 2d. 2. 47. 11. 8 2d. 516. 7 East 23. Comp. Winn's proper
Ch Pl. 5. 112.

The Pif in ejectment must recover by the strength
of his own title & not on the weakness of that. 4 Barn 2457
of the Dft. hence as a gen'l rule the Dft may. Bull. 10 M 10
defeat the Pif if he proves that the Dft's title Esp. D 455.
is in a stranger
(2 Day 227 a
437.

The case in 2^o Day as reported contradicts this rule but
it is said that the objection in that case was to the 1 Sw 3 509.
deeds offered in evidence by Dft & not to the proof of title in it.
This rule cannot hold where the Plf holds under 7 D 2 450
a title from the Dft nor where the Dft holds 13 D 760
title under the Plf. for in both these cases the Bull. 10 M 10.
Dft is estopped from proving title in a stranger. Esp. D 457
thus mortgagee brings ejectment ag^t mortgagor
thus mortgagor makes a lease & sues the lesee
in ejectment. rule the same if the lease was
verbal.

The devisee of a ten for years cannot at com. 11a 70
law maintain this action till the exec^t has. Esp. D 436
apportioned to the legacy or devisee. Roper 190:1
Pont. D 188.
1 P.M. 544.

This rule does not hold in this state.

But in case of the lessee's death before
the lessee cannot sue until after distribution

~~466.24.6~~ But the lessee of a freehold may maintain
Esp. Dij 437 action immediately on lessor's death.
Port. & 1903

466.24.7 The assignee of a bankrupt may maintain this
2 Day 70. action for lands belonging to the bankrupt
for the stat. transfer the legal estate.

466.25.5 If an action is to be brought in favour of
Hab. 16 one non compos ~~et~~ must be brought in the name
2 Wil. 130.1. of the non compos by his conservator or committee
Esp. Dij 438.

466.25.6 et ex'a or administratrix may maintain this
2 ventro 20 action for an ouster of a chattel real belonging
3.7.13. to the deceased whether the ouster was of the
Esp. Dij 439 deceased while alive or of the ex'a or administrator
after the death of the deceased.

By the common law in general an alien cannot maintain ejectment because he cannot hold land but 47 R 300 as he may hold a house &c as lessee & therefore he may 286 249 maintain ejectment for a house.

293 274

60a. 2d 2:3:8. 129

This is in genl the law in these states but in some 760 16. of them the rule has been relaxed by stat. New E? any day? an alien alien

But when an alien becomes naturalized he may maintain ejectment for land

745. 2d 136. 133.

6 165 54 74.

4 Do 133. 136.

Possessors
the declaration must show a subsisting title at the time of action brought & if the lessor has not kept his title at the time of action brought 459. he can't recover. It is said that he must state 611. 103. his title as it is. but he need not state the precise length of his term if he alleges for so many yrs he may recover for so. if he proves title to his term for that time.

3 Mil 274.

Findings In the English action the declaration ^{needs not} states that the parties entered the court on the 3rd of Decr 1824 & say that merely that he had a lease and afterwards entered for under the common rule the day is not traversable.

The great object of the common rule is that the title may come fairly into court. We therefore have left the case at all unnecessary question.

In this state the declaration alleges that on a certain day he was possessed & seized & that afterwards on a certain day the deft with fow and arms entered & ousted the plf.

Bull. 1806 The owner should always be allowed to have his day. Happens after the accruing of the nominal title. His title for the record must be consequential. If however the plf shall declare that on 1st Jan 1825 his title accrued & that afterwards to wit on the 1st of Aug 1824 the deft entered & this is good except on special demurrer for the pt will consider the words "to wit on the 1st of Aug 1824" as surcharge.

It is said that no particular day was readings
 be alledged for the master it is said that if ^{by 131}
 it appears to have been after the Plt's title had ^{by 1408.7}
 accrued it is sufft but I G thinks that if
 no particular day is alledged in the declarai
 it w^t be good i.e on special demurrer but
 under the genl rule the day perhaps is not
 very material still I G thinks that a caveat
say w^t albedo the particular day.

The land to sued for must be described in 2d day 1470
 the declaration with all convenient certainty comp 250.
 the rule was formerly much more strict. & Stra 834
 it was formerly held that the description must be 909.1 Wal 154.
 sufft accurate to enable the shff to know the land. 18 Jun 129.30.

Dec 145. 3 Mls 23n 1 East 441 5 Jun 2673. 178.11.

The lepo of the Plt must point out the land to the shff at his peril. & if the afor 1063.
 show to the shff difference from that found he Com 350
 recovered in quantum he is liable in treachy. &c

In this state we describe the land as lying 3 Mls 23.
 in such a town & to describe it by its abbutts 77R 333.5
 int here to is not usual to mention the partr 2d L R 706.
 ual state of land as meadow &c tho' we Pbl 18109
 gently state the estimated quantity tho' Exp 1408.7
 parish & species & quantity must be stated in 2 Chitty
 Eng Ed. Civil Entries

Headings If there is a mistake in the parish in
 3d & 595. Eng^t or town here the mistake is fatal
 Es^t £500 for the parish or town enters into the description
 2d & 2731.
 2 East 497:9. 501:2.

3d & 334. But the Plf is not bound to declare for the
 cov^t £62. exact quantity wh^t he can recover he may
 bro £13. declare for 100 acres & recover 5 acres. This rule
 Es^t 2d & 447. applies to chattels in fles^t, ap^t & tow^t & to land
 2d & 326. in fles^t, ap^t quare ter^t. But plf can never recover more
 than he declares for.

If he declares for a larger am^t than
 he has he may recover for such more as
 he has, provided it be less than three
 times 106 the declare^r for.
 Es^t part 4, 8

Ejectment (nos)

Readings

The deft may deny that he was in possession when the action was brought. & the he may willfully have committed an actual waste yet the Rep. 1841. 810 cannot recover unless the deft is in possession 77 & 827 at the time of action brought. & the Rep. 1841. 573. must always prove the possession of the deft Expt. 1453. at the time of action brought. unless when it is admitted on trial.

In Ejectment the civil ipue is not guilty. in 3 Bl. 335
despicio the civil ipue is no tort in despicio App. 49. 103
In the English practice special pleas in bar are 2 delin. very uncommon for the common rule requires. Rau 19a 238
the deft to plead the civil ipue - genit. Pac. abr. exct. c. note

In Court special pleas in bar are as common as in any other action. for we have no fractious & therefore no common rule. Yelv. 180. 3 Bl. App. 819

Evidence:

The deft may recover by proving title in a Bill 1841. stranger but the title must be a valid Expt. 1453. 7 subsisting title. the deft must prove possession in the stranger within 20 yrs.

Warrantment

Evidence The st of limitations must be pleaded
in summing under the gen'l rule. the common rule is
the only reason for at com: law the st of
limitations must always be specially pleaded.

Expt 186 If the Plf. declares for several subjects he
Expt 470 may recover one with recouring the rest &
tho' the declaration shd be ill as to some
he may recover other things if the declaration
is good as to them.

Expt 471 Where the Plf. declares for land or u/b
Expt 17.18. buildings are standing the buildings need
not be mentioned for the buildings will go with
the lands. and are comprised under the term "land"

Expt 151 If the Plf. recovers ~~judgt~~ he is entitled to
Expt 472 a writ of ~~for~~ habere possession & under this
writ the shft is required to put the Plf. in
possession & to turn out all other persons not
not only the deft. but third persons

This is the only civil process on which the Def
may of course break the outer doors & arborow & b. 91.6
of the mansion house of Deft side "Shffs" 2 Bac 179
Secular 2

In this state if the Def shd acquire possession 1800 173
pending the suit he is entitled still to damages
& full damage tho the usual practice is to
bring trespass for the damages & to recover only nominal
damage in execution & the Def in this case of course
covers his costs.

In Eng^t if the Def regains possession late pend. 1800 108.
the Deft may plead this in bar but after issue 1800 184.
is joined it is discretionary with the Jt to admit
or not to admit the plea.

If the term sued for expires per late the 24 May 1800 232.
still have damages & costs for the original trespass 1800 185.
still remains tho the term is expired
6 Oct 1800
3 Mod 1847
1800 182.

If after the Def has been put in possession
1 Feb 779 the Dft again ousts him the Plf may have
2 Dec 180. a new writ of fa: ha: pos: or he may proceed
to sue agt him as for contempt of court. If he
takes the latter course the Dft may be fined impri-
soned &c.

For new trials vide "new trial" & 4 Ban 224
1tra 1106. Esp' Eig 490. Iack 648. 050. Ld Ray 514
5 Ban 253. ~~for~~ trial.

Trespass quare invicem for mesne profits.

3 Bl 205. The practice when in the Plf's favour prov.
Esp' Eig 494. that from the ouster the Dft has been
^{Deed of Inv.} trespasser for when the Dft is put in
^{Exct. M.} possession, by fiction he is deemed to have
been in possession from the ouster & hence
is denied the right of the Plf to bring
an action for the mesne profits and this
action is called 'trespass for mesne profits'

After ejectment the Plf may have the mesne profits
action of trespass quare se for mesne profits 3 Wlo 121
The rule of damages is in gen'l the valuealk 638
of the use of the land during the Dft's poss' 3 Bl 205.
but if extraordinary damage has been done Bro C 182
these damages make a ~~more~~ ^{more} sum. Ceph D 494.3.

The declaration in this case may lay the 2 Dec 111.
trespass with a continuando from the time of 2 July 977
the ouster to the time of the Dft's being put ^{Plad at 502}
in possession. This is declaring according to the legal books of
effect if by fiction the Plf was in possession from the entry
the time of the ouster. 3 Wlo 121.

Or the Plf may state the facts precisely as they
are i.e. that on such a day the dft ousted the
Plf & continued in possession so long.

This action is inseparably incident to the 3 Wlo 121.
action of ejectment. It is said indeed that 1 Verm 105
the Plf may bring a bill in Chancery for an 2 Dec 111.
^{Plf's} account in this bill the dft must be treated gen'l(h).
as a baileff, but this is out of use.

Mesne profits.

3 Bl 205 For the receptivity of the action of trespass v. the
 3 Milling authorities. It is indeed said that the Plf can
lawfully recover for the mesne profits in ejectment
 2 Bac 181 But the rule & practice is otherwise... In
Ejectment on principle damages can be recovered
 " 1679 only for the first days trespass, & the other
 damages accrue while the Plf is out of posse.
 In this state the Plf may recover the whole
damages in the action of ejectment still
our practice is the same as in Eng^t, such
is the established rule in this State-

6 Mod 222 In the action of a mesne profits the Plf need not
 2 Bac 111 prove by witness the entry of the Def for the
 1647. record in ejectment is conclusive evidence of
 the ouster by def. - But the Plf is not
 in proof confined to the time of entry so
 stated in the Ejectment. He may recover for
 preceding profits if he can prove title to before,
 Bull N 87 This record however proves the ouster only from
 3 Bl 205 & the time of the lease before ouster is laid in the declaration
 Esp Dig 44 If the Plf claims for any other trespass he must
 prove it by other witness & all may be put
 into the same declaration. - the trespass
 comprehended in the declaration in ejectment
 is conclusive only of the Plf's title for the time
 comprehended in the declaration, and as to this
 the def cannot controvert it. if the record
 in ejectment proves the Plf's title at the time of
 the ouster laid but not before that time

Mesne profits

The record in ejectment is no evidence in an action agt a stranger to the record in a prior ejectment, as to him it is res inter alios acta - 1 Ad 239 Esprigg

This action for mesne profits is in the purview of Bull. 185 the st of limitations as to to pay the Plf thew Esprigg. can recover only from for 6 yrs profits before action 3 Ad 205. brought & only for 3 yrs in Conn. ---

In Conn. full damages may be recoverd in ejectment. You can the Plf in ejectment recover for more than 3 yrs profits. - No.

This action for mesne profits may in law be brought by the real plf or by the fictitious plf when brought in the name of the nominal plf if he in violation of the real plf's right (he is guilty of Bull. 185 contempt) makes a release to the Dft. the rule of course supposes the nominal plf to be a real person as he frequently is. 1 Ban 665 Esprigg 415

And tht w^t no doubt in this case w^t not allow the release to be pleaded This has been done in similar cases.

(85).

This action may be brought after recovery in
[Wl. 118] ~~ejectment agt. & tenants~~ ~~tenants in common~~
[Pitt 5323] & ~~coparcener~~ by them partakers this is an
Ex parte 495. exception to the genl rule that trespass cannot be
maintained by one & tenant agt another &c. &c.
It tenants &c. Because this action is
incident to ejectment. and
Section S. 323. Bouler West authority.

(56)

(87)

(88)

(89)

(90.)

(91)

(92)

(93)

Trespass quare clausum fratre

This action lies for injuries done to real property.

The damages for all real actions lie in respect of
exter abatement intrusion disseisin &c &c

When an injury is done to a house, the injury is called larceny
trespass quare clausum fratre. - 3 Bl 209 3rd d^r

The trespass remedied by this action consists in one person's entering upon another's land and doing some damage, with lawful authority. 3 Bl 209 3rd d^r 10.5.29

And where there is an unlawful entry upon another's land the law always implies some damage. Actual damage need never be proved except to enhance damages.

Every unwarrantable entry upon another's land then 3 Bl 209. 10 is a trespass & is called trespass by breaking his close. 3 Bl 209 3rd d^r 10.5.29

Feb 17. 18.

In certain cases entry upon land of another with actual permission of the owner is warrantable. 3 Bl 212. 8 Co 146. Thus a Sheriff to execute in legal manner lawful process may enter on land or peaceably into a dwelling house. 3 Bl 209 3rd d^r 10.5.29

Thus one may enter to demand or pay money payable at that place. -

Thus one may enter to distrain for rent.

Thus a reversioner or remainder man may enter to see that no damage is done. -

Thus all travellers may enter on land to eat or sleep. 10.5.29

(1)

Trespass quare clausum &c.

Thus also if one leases land excepting certain trees
10 R 46. the lessor with permission of the lessee may enter to
11 R 52a cut down the trees &c.

Mef 59.

Esp^t Dig 381 "Iads 58."

Esp^t Dig 380 Thus also one person may enter upon another's land
3 Bl 312:13 for the purpose of destroying noxious animals. Thus
12 L 334 for the public good.

2 Bul 62. But the hunter in such case may not dig the soil.
(conyng Dig Tres. d centre)

Salck 556. Animals not noxious may not be pursued on
esp^t Dig 404. another's land. This rule is strictly enforced in Engl.
3 Salck 61. not so in this country.

Salck 556. It is indeed stated that if a start a hare
Hollo 875. upon his own land that he may pursue it upon
the land of B. sed quere.

(2)

Salck 556. By com: law if an animal for nature is birth
Esp^t Dig 402. started + killed on my land it is my property.
This is not practically the law here, in all cases
here the property belongs to the hunter

1. 4 Bl 531-51. It was formerly held that a poor person might
9 Bl 2253. after harvest glean upon the land of another
3 Bl 262. but this has lately been held not to be law.
Esp^t Dig 413.

860 146. Where the law gives one a license to enter upon
3 Bl 213. another's land a subseq^t abuse of that license
bro 148. makes that party a trespasser ab initio. +
Esp^t Dig 381:3 proof of the abuse will support the allegation
17 R 12. of having originally trespassed. for in such case
the party is presumed not to have entered under
license of law. and besides in such case the law
unless a condition to such license is it shall not
be alured -

But it is not every instance of improper conduct
 wh will thus make him a trespasser ab initio. 5 Bo 146.
 & more, now forsance does not make him a trespasser 3 Blc 213
per relation. Expt. Dg 383.
 5 Blc 1612.

And the act wh will make him thus a trespasser
 must itself be a trespass, or comprehend a trespass
 it must sound in force & arms.

- (3). If a party having lawfully dist'rened refuses 5 Blc 162
 to deliver the dist'rep upon tender of suff' arms & trespass (b).
 this tho' a wrong does not make the party
 refusing a trespasser ab initio. But if he kills
 or beats the cattle dist'rened he becomes a
 trespasser ab initio.

It is true however that if a Shff having made Salk. 409:59
 an arrest on mesne pro esp neglects to return his Exp. Dg 412
 wch he is a trespasser ab initio. but this Corp. 20.
 has no connection with the doctrine of trespass 1 Wil 171.
per relation. the reason of this rule is that Bac Ab
 the Shff cannot give in his wch for evidence to trespass (b)
 he therefore has nothing whereby to justify his
 entry. A pro esp not returned is no evidence in
 favour of the party omitting to make the return
 When a person enters upon another land or into 8 Bo 146.
 another house under an actual license from 6 Oct 143.
 the owner. no subseq. act will make him a
 trespasser ab initio. he must indeed answer
 for his subseq. acts but he is not to answer for
 his original entry. for here the law annexes no
 tacit condition for this is an express contract
 between the parties.

(3) Trespass quare clausum - act need not be voluntary

It is laid down that to constitute a trespass the
act complained of must be voluntary. and that
therefore if the act be involuntary & without fault no
action lies

Tresp. q. 1. Now this rule is precisely the reverse of the genl rule
for he who by a forcible accident injures the person
or property of another is liable in a civil action
of trespass tho' it was done by the most
excusable accident.

416 124. The rule first stated is never true where the accident
is 126 239. was by the person of Dft. the fact whether the
tresspass was willful or by accident will indeed make
147. a material difference in damages but if forcible and
done by the person of the Dft the action will lie.

2 200 89. He who does an act from which he or a
100 6 81. third person must suffer ought certainly
Doubt 649. to bear the loss.

2 200 467. 2 200 37. or will mistake or any accident, not inevitable
2 200 33. excuse him who has done a forcible injury to
another in his own person. tho' the fact of the
mistake to will mitigate damages

This rule applies only to those cases in which the act
complained of was committed by some agent for
whom a force will the Dft. is responsible. in such case
the act must be voluntary on the part of the Dft.
or he cannot be subjected in this action. Thus if

4 200 262 my servant commits an injury without my consent
2 200 361. or privity I am not liable in an action of trespass.

2 200 333.

147 119.

13 110.

Trespass quare clausum - Who may maintain?

Trespass can be maintained for an injury committed on land lying in a foreign country, for the subject being local the action is also. The rule is diff't with respect to personal property, for this has no settled home.
 4 N. 503
 Stra 646.
 Conqu. Dij
 Tres d.
 Esp. Dij 102.
 (N 26.54"

Who can maintain this action?

No person except him who has the actual possession at the time of the injury can maintain this action -
 for this action is adapted mainly to injuries to one's possession - Trespass means an invasion of possession.
 36 Ch 209
 Patch 263.
 Esp. Dij 383. 1st
 Conqu. Dij
 Tres 61.3
 2 Buls 268
 Bacch. 6. C. 23

In the case of personal chattels constructive possession is sufft but the law knows of no such thing as constructive possession of real property.

In this state right of possession of real estate is "first in right" if no other person is in the actual possession as where an heir inherits property and has not taken actual possession he may maintain this action unless some other person has taken actual possession.

It is said in the old books that to entitle one to this action the possession must be rightful.
 & that an intruder cannot maintain this action?
 Lound 546
 Delon 114.
 5 Soc 166.

(6)

Who may maintain trespass quare clausum fr.

But this as a general rule holds only between a wrong doer in possession & him who has the right of possession. thus far undoubtedly it does hold.

that is the wrong doer in possession cannot maintain this action ag^t the owner of the right of possession.

For the owner by the supposition has a right of entry.

1 East 2446. But any actual possession is sufficient to support the cause of action ag^t a mere stranger. formerly not so.

2 Barr 1563. If it is desecrated by C - B may maintain an action of trespass ag^t C - or ag^t any stranger who commits

Miller 221. a trespass during B's actual posse - If C

Esq^r 4 D & 102. commits a trespass on B while in actual posse

the law will not enquire concerning B's title

2 Roll 554. The person in whom the freehold is can't generally maintain this action for an injury done while his land was in the lawful possession of another.

4 Keon 184. his land trespassed upon is in the possession of Bacchus or c. 3. lessor for years at the time of the trespass committed to the lessee & not the reverend reader must bring this action.

(7)

For the reverend reader is neither actually nor constructively in posse

Eph^r 4 D 44 And by the common law an heir on the death of his ancestor cannot maintain this action until he by himself or agent has entered on the land.

2 Plow 142. but if he afterwards entered he may maintain this action ag^t a trespasser who committed the trespass before he entered. for he is then seized by relation.

but in this case he must enter before he commences the action.

But this rule does not obtain here for the right of possession is here as alient to actual possession. if no other person has the actual possession

a person dispossessed of land cannot maintain his action for an injury done during the dispossession unless he has entered before he commences the action Esp^d by 418 if however he enters after the injury he may bring a ^{complaint} D^r 6.3. then commence this action for by fiction he is deemed to have been seized during the whole Roll 533 time & he may maintain the action at the 5th Dec 166 disposer for injuries committed by the disposer 11th Oct 512 during the dispossession. Readers ^{adversary} 312. \$1698
2d May 857 2d Oct 5374

But if the estate of a disposer determines during ^{complaint} D^r 6.2 the disposer it seems that he may maintain his 62 this action for an injury committed during 2nd Roll 530 the disposer & necessitate

And in the case of the action of the disposer ^{complaint} D^r 6.2 he may lay his action with a continuando 6.2
6th Oct 2574

Or he may state the facts as they actually were ^{1st May 97} that he was ousted on such a day ^{striking back 26th Oct 97} ^{assured} ^{deemed} ^{time}, mentioned &c.

The modern practice is now to lay an trespass with a continuando but now it is customary to lay it ^{as} disposer ^{desert} & ^{vacates} from the 1st of April to the first of Sept. a continuando or indeed now as good as ever but not so much practiced.

(8) Who may maintain trespass quare clausum re.

A Dopeizer cannot even after reentry maintain this action agt a stranger for injuries committed during the period 70:4 dicozen for the fiction exists only as between the dopeizer 1160 57a &c. & dopeizer. Then dopeizer is himself dicozen by I&L now 60:150 the original dopeizer cannot maintain this action agt I&L 2R 11534.579 but must take his remedy agt the first dicozen.
bro E 5740 Same if I&L purchases from the dopeizer. This fiction Comyns Dig can never be extended to strangers to make 1ns 6.2. them trespassers in law agt those upon whom 1160 57a &c. in fact they have not trespassed - But in the 5Baw 188. h'case the first dicozen is liable for the whole 2 East 20446 time viz during his own dicozen & that of 1160 57 b. the second -

1160 51.2. But this rule holds only as to this action of trespass
60:153 b. quare clausum re. & not as to the property whh the 560 65 a. stranger may have takew from the land. If therefore 406 132. dicozen is dicozen. the owner may take the profit bro E 61. 464. of the land during the second dicozen whencever he Doug 21. can find them. or he may demand the property of the second dicozen and I&L thinks may maintain h'over for them tho' the authorities do not go as far as this -

Comyns Dig But the rightful owner before reentry may have the 1ns 6.2. action agt the dicozen for the act of dicozen itself 2pt. Dig 118.504 that is for the trespass of the first day. for that pot 52' trespass was committed while he was in actual possession.

So a party dispossessed may maintain this action during the dispossession for a trespass committed before the dispossession, either ag^t the dispossessor or ag^t any other person. - The law requires only that a person sh^t be in possⁿ at the time of the injury done, not at the time of the action b^t 604.

2 Rot 4553

5 Bac 168.

tr C 3.

This action may be maintained by a person in possⁿ of a freehold, term for years, estate at will or copyhold estate at sufferance & indeed any one in possession of the land trespassed upon whether he has any property, 2 Rot 4551, in the land or not.

5 Bac 167.

tr C 3.

But a tenant at will or by sufferance or a dispossessor 13 Ed 669 can maintain this action only as ag^t a stranger 2 Bl 500. 150. 13 & not ag^t the landlord or rightful owner. 6 Est 57.

But it seems that now tenant at will may maintain this action ag^t landlord, for tenants at will are now tenants from year to year, & tenant from year to year may maintain this action ag^t his labor.

In as to tenant by sufferance 6 Car 8 284.

Tenant for years during his term may maintain this action ag^t the labor. For during the term he has a complete right to the labor.

And it is agreed in the old books that if the labor invades the elements of the tenant at will the tenant at will may have this action ag^t the labor, or at least trespass w^t lie tho' perhaps not trespass q. c. -

5 Bac 167 tr 9 2

1 East 139

2 Bl 146

Copyhold

Laws 61

Bro 143

Cestud 402

(post 21)

(10) Who may maintain trespass quare clausum fratre

It is said in the old books that tenant at will
1 Ed 34. cannot maintain this action ag^t one who has an
5 Ed 167. colour of right. but this is not law for by
1 Ed 3. colour of right clearly cannot be meant
2 & 3 Eliz 1. a groundless claim of right - this w^t be
2 & 3 Eliz 1. a reproach to the law - any strange might
do's claim in this way -

(11) Contra Dij

It is said that lessor at will may maintain this
Tres b. 2. action ag^t a stranger who injures the land wh^t his
2 & 3 Eliz 55. the land was in occupation of lessor at will, but since
tenants at will are changed this rule is now not
law. or rather this rule has no application

5 Ed 167. If the lessor for years reserves the trees he may
post 24.5. maintain the action of trespass quare clausum fratre
during the term ag^t any one who cuts down the
trees. &c. for the land on wh^t the trees grow are
lessors. they are impliedly reserved with the
trees. -

5 Ed 167. A person entitled to the pasture or herbage of
Crown Dij land merely may have this action of trespass
3 Ed 1. quare fratre ag^t any one who injures the herbage.
Pro Chas. for the power of the herbage is necessarily for the
3 & 4 Eliz 54. time being the possession of the land.

552

3 & 4 Eliz 213

3 & 4 Eliz 10. The rule is of course that the lessor of the
6 Ed 1.62. pasture is in occupation either actual or constructive.
3 & 4 Eliz 10.

And the owner of the herbage has the action
if the person enters by permission of the owner of East 602
the land. and therefore not the owner of the land
himself. - The owner of the land is not
owner of the herbage.

The owner of the land need not in any case be in possession
of the land at the time of breaching 3a 62
the action. for the injury is complete if the owner 2 Rob 509
was in possession at the time of the injury done. Plowd 24.1
The right of action accrued & was complete 5 Bac 167
during his posse & this right cannot be lost c. 3.
divested by a sale of the land.

And the action of trespass quare invicem as well 2 Rob 8. 2a 30
for injury to land uninclosed as to land inclosed. 7 East 207
for a mona close or clausum in Eng declaration 6 East 184.
does not necessarily mean land enclosed with a fence / Plowd 183.
but any land or border of land in general. Stra 1004.
16a 2 173

The owner of the soil of a highway may have Stra 1002
this action for an injury done to the soil. It 1 Ban 143.
is thrown open to the use of the public as 2 Rob 509. 123.
an easement but still the land belongs to 5 Bac 167. 6. 2. 3
the original owner - as also the trees growing 1 Bul 157
upon it as also the minerals or fossils underneath
surface of it. The public have a right to use
high way the same standing they have a right to
look at the sun or moon, but they have no
right to the surface of the one more stably
other.

(2)

Who may maintain trespass quam clausum.

Where a highway is laid out on the land of another the fee remains in the owner - proprietor & all other rights etc lie & remain are not necessary for the purposes of a highway are in the owner of the adjoining proprietors

Now the ancient highways were laid out while the land was in the property of the proprietors of the town. & in such case the right of way in the highway belongs to the corporation of the original proprietors. but if the highway was laid out after the land was divided between the proprietors then the usual rule last stated holds viz the fee is in the owner of the adjoining proprietors.

Ex 1810. ~~Freshas or~~ ~~or~~ ~~or~~ will lie to recover any part the curbs of the highway subject to the easement.
But in Court the subject is altogether confused.

(13)

Oct 4th 1813. Where A owns land & is let to B to be tilled by
2 Oct 5th. B on agreement that they are to divide the crop
5 Dec 16th. if a bushap is committed on the land, according
24th. 3 to some A must bring this action alone. but
5 Nov 8th by the same opinions A & B may join for injuries
1811 N 85 done to the crop. But I think that the
2 Sept 1st 1812 party raising the crop ought alone to bring the
action quam clausum regit. & that A can neither
maintain the action alone or join. for B is in
possession of the land, and in law B is owner of the
whole of the crop but comes to pay part of it.
is the owner of the land, as rent. And this is in
accordance with a late opinion

Tenants in common as well as the tenants had
sown in this action which arose as far as injuries done to the land owned jointly by the farmers & lessors are. etc. And the same principle holds of espaces. 36194.

2.9.2.357
C.R.
B.M. 404.

For what injuries the action lies.

Every man is answerable not only for his own trespass
 but for those of his cattle

As if by negligent keeping they stay upon the land of another the owner is liable & much more if he permits 5 Decr. or drives them on to the land of another. Qui facit per alium facit per se.

But if they enter through neglect or fault of the owner of the land the owner of the animals is not liable as this 5 Decr. the insufficiency of the fence which it is the duty of the true owner of the land to make.

But the cattle may also be taken damage tenant 386211
 and held in custody until satisfaction

Sac abr
Tres f Pi.
E. f. T. 386.7

We have many statute provisions on this subject. vid. St
 title "Pounds"

(10)

For what injuries trespass quare clausum te liz.

But the party trespassed upon cannot have
1 Rul 348 both actions if he brings trespass he cannot abandon
5 Bac 179 that action & distress, neither if he distress can
1 Rob 1113. he afterwards bring trespass. unless with his neglect
Sip 27387 they (Vide "Replevin") escape

1 Rul 665

It has been held that if A by a tatious act
5 Bac 175 puts the cattle of B onto C's land C may distress
Trespass them as damage feasant and B must take his
1 Rob 1107 indemnity agt. C. C has no occasion to inquire
Sip 27385 when he sees animals trespassing - where they are
5 Bac 171. the only inquiry here is where the cattle trespassing

2 Rul 553.

In this case B wⁿ not be liable in trespass for
as is in no fault either actually or constructively
the animals are mere instruments of
mischief in the hands of A - & the case is
the same as if A shd use B's cane to commit
an assault of battery

2 Blk 6895

If a tree of A is blown over onto the land
Dow 719 a^c of B, A may remove the tree in a peaceful
5 Bac 175 manner & his trespass lies. - B has no claim
to the tree. the property continues in
A but this claim wⁿ be futile if he
c^r not go onto B's land to take it off

2 Blk 695.

But seeing if A in lopping branches suffer
Dow 719 them to fall on B's land,

If A's timber floats upon B's land & does injury A is liable ^{as} an action of trespass on 2 HBl 57.8
the case. but I think that this rule applies only to cases where it is guilty of neglect.

If A's horse is stolen & hurt onto an enclosure 2 HBl 555 of B. It may go onto the land of B. & take 5 Pac 178 the horse. - Here again A's property is, witht ^{and f.} his fault or another's land He does not look the property to ut supra page 16.

If the fruit of a tree falls onto B's land & is just ^{Latch 120} fed in going after it. This rule appears to decide Dug 719 ^{opponens} the question to whom the fruit of a tree belongs. 5 Pac 178. when branches overshadow another's man's land. ^{Oppress f.}

It is said that if the roots of a tree standing
Decr 1757 on A's land extend into B's land. A & B are tenants
in common of the tree & fruit. But if the roots
do not extend into B's land the branches
overhang B's land yet the tree & fruit belong to
A. ~~sed multum quare~~ the use leads to
controversy & confusion. & is inconsistent with
the rule last mentioned - If they are
tenants in common they are so in proportion
to the quantity of roots in each & how
can this quantity be determined.

1 Moody & Malkin 112. the property in the tree is in the
owner of that land in which the tree was first set (planted)

(18)

Trespass quare clausum fricet (No. 2)

If it being bound to repair a bridge cannot do it while going upon the land of S. It is ^{5 Dec 1779} justified in going upon B's land and the same rule to fol. undoubtedly holds where a corporation as a town is obliged to build & repair a bridge -- It is indeed the privilege of the public but this justifies the trespass

The same rule

If on a navigable river at full tide ^{1 Edw 725} it necessary to go onto the land of the adjoining proprietor ^{6 Mod 163} to tow up his boat. -- but now the rule is varied. such ^{5 Dec 180. 1.} a privilege can be warranted only by special ^{3 Eliz 253} custom & such does not exist in Eng^l or ^{18m 29e} in this country at present. The necessity is not here as great as in the next case which seems to make the difference --

(19)

But it seems to be agreed that if a public ^{1 Edw 725} highway is so out of repair that travellers cannot ^{Doy 716. 717} pass it travellers may pass over the land of the ^{3 Eliz 263} adjoining proprietor for the necessity of the thing ^{2 Eliz 26. Show 28.} but if the land of the adjoining proprietor is inclosed ^{bought by} it is doubtful whether he may take down a ^{1 Eliz 234} fence probably he may. such is the practice, ^{1 Eliz 234} This rule does not hold of a private way. ^{2 Hen Doy 716.} the public are not concerned & beside it ^(2 Eliz 26 not law) is the duty of the grantor to repair ^{bought by grantee} ^{Chanc. 6.}

Douglas Taylor
Whithead

(19) Trespass quare clausum - for what injuries it lies

That one who has only a right of common
3 Ell 552 cannot maintain his action ag^t one who
5 Bac 167 injures the herbage. If however he is disturbed
t^c 2 in the enjoyment of his common he may have
2 Bl 33. a special action² in the case. This right is
incapacit - trespass therefore cannot lie -
vide Trespass on the Case &c. ~~et cetera~~ for meadow
in case of disturbance.

(20)

Plowd 70 The entering of another's house without permission
3 Rol 555 or lawful authority is strictly a trespass even
5 Bac 182. tho' the door be open. but if one has been
Tresf 2. in the habit of entering without permission the
acquiescence of the owner & the use of the house
is construed into a license.

6o An 240 But if the owner of a house has unlawfully taken
5 Bac 182. the goods of another into his house the owner of
Bac 2. the goods may, the door being open enter for
that purpose & taking the goods without permission
and if the goods were stolen he may break the house
to enable him to enter. The owner is the aggressor
This is analogous to the cases in pages 16 & 17 ante

How far one may enter another's land or house
to suppress an affray &c. vide false imprisonment
& larceny.

And for the purpose of executing process vide
larceny & jailors. for such purpose, the officer often
will detain the body of the criminal, notwithstanding
the door open.

56o 91. 4 Leon 41. Vide also p 1. 2.

The entering of another's house for the purpose
of executing a general search warrant is not
justifiable for such a warrant is utterly void
Vide false imprisonment

2 W&B 275

296.

Expt Dij 399

Dart 409

Julk 448.

Went 31.

A Sheriff may not in any case, to execute a Ceasus
civile process break open a house. This is called breaking
the person's castle.

Mob 52. esp

de 604.

P.Bac abr. 8.2.

Against whom this action lies.

This action will not lie against labor for labor in 466. 62.
for wrongfully cutting or cutting & carrying away timber because the labor is not in possession Expt Dij 401.
nor has a right of possession. Waste is had at the
labor's remedy. This supposes the cutting & carrying
away to be one continued action

But if after the timber is cut it is permitted to 465. 62.
remain for a time & then takes away the timber trespass Dij 400.
or brown will lie for carrying away the timber as
a chattel but not trespass qua clausum figil, for
here the timber becomes a chattel & the labor has
constructive possession of the timber but there is no
constructive possession of real estate

It is trespass "de bonis exportatis".

(25) Ag^t whom trespass quare clausum & les.

If one leases land excepting the trees the lepa
l^t 1157a may maintain trespass quare clausum against the
Exp^t 87400. lepa for cutting the trees. (vide ante) 11-

l^t 1157a Formerly this action w^t lie by the lepa ag^t to him
Exp^t 87400. at will for cutting timber, but now tenants at
l^t 1157a will be tenants from year to year.

5 b^t 13.6

boc 784.

2 Bl 150 But the action will not lie ag^t tenant at suffren
Exp^t 87400 until the lepa has reentered this wrongful act
does not determine the estate of the tenant
at suffren until reentry,

l^t 1157a But if at sahra^t the trees are reserved the trees
Exp^t 87400 are injured by the cattle of the leper the leper
is not liable in any action. For the leper
has the right to put his cattle on the
land & the damage is at the risk of
the leper unless there are special covenants

(26)

4 b^t 34. The action will lie ag^t a minor and a subject
l^t 13.110. of any age. This is true of all actions
5 b^t 134. of trespass - The intention has nothing to
do with acts committed with force & arms

Every person concerned in the commission of a trespass are liable in this action. aiding or abetting will make one a principal where the same acts w^{ch} make one an accessor in case of felony. In trespass there are no accessories.

12er 124

5Bac 105.

4BL 36.

Sack 409

Bac tr 91.

If A agrees to a trespass committed for his benefit by B. He is liable tho' he neither requested it or aided or abetted. (agrees here means accepts) Thus if A a master is present while B his servant is committing a trespass for A's benefit & does not prohibit the servant, trespass will lie ag^t A for qui non prohibet cum prohibere possit iurat -

If several join in a trespass the party injured may sue them all in one action, or any number of them in one action, or one of them alone or each of them in separate actions.

5Bac 105.

Bac 111

i 13.

It is said by Bacon that if the action is b't ag^t one of several trespassers an action will not lie ag^t any of the other trespassers for the pendency of the suit ~~that~~ ^{is} b't ag^t one he says is a good plea in abatement to the others but this is not law.

He can however recover only one assessment of damages, only one satisfaction, yet he may sue each in a separate action. ut supra.

Hob 66.

Civ. Dig 415.

Bac 111

J. D.

(27). Trespass quare clausum fecit.

Hence a recovery, ag^t one of several joint
bro^t 173. trespasses is a bar to an action ag^t any of
Yelv^t & the others & if several suits are depending
Expt. Div 416 at the same time ag^t several j^t trespasses &
bro^t 30. judg^t is recovered ag^t one the proceedings are
barred & the others will be stayed
pl 5 18. 207.

3 Bonn^t R This rule has been denied in Count. & see Yelv
67(n).

5 Bac 187. It has been said that an acquittal of ^{one} of several
Abt^t 187. joint trespasses is a bar to an action brought
ag^t one of the others. This never was law.
The acquittal cannot be rec^d in evidence

2 Rot 46 If A's cattle being kept as bailees by B. B is
2 Rot 387 clearly liable if the cattle break out. 65

5 Bac 188. inclosure & according to some opinions B
Jent 161. alone is liable. but of this latter part of the
rule I G doubt.

occurrences in this action

When the trespass consists in the abuse of authority given by law where the Dft is made trespasser by relation it is sufft to state the trespass generally ^{Eg. Salk. 1881} And if the Dft justifies by pleading the license of 3 & 2 & 2. law then the Plf sets forth in his replication the 17 & 47 & subsequent fact whch makes him trespasser by relation. Esp'ly 405

The plf for the purpose of aggravating damages ^{may state the 61.}
in his declaration wrong for all, alone he has no Esp'ly 407
action Salk 149 642.
2 Barr 114.
62 1664.
15 Co 130.

Apparently contra 10. C. O. 130.

It has been made a question whether the Plf can ^{18 Bac 2.} declare in the same action & count for breaking his Head b¹ house & for beating his servants per quod servitum b¹ & amict. I G trust that when the whole injury ^{Esp'ly 407} complained of is one continued wrong both may be joined in one count. but if A broke the house on ^{I Idel 642.} one day & on the next day beat his servants both then ^{12 & 3. 386.} trespass cannot be declared in one count & on principle ^{68 R. 133} they cannot be joined in one declaration because ^{18 Barn 346. n^o 2.} when the beating of the servant with a lop of service ^{2d Ray 1032} is a distinct offence it sounds only in case but by ^{2d Ray 166.} precedent these offences may be joined in several counts separately in the same declaration

(31) Declaration, in trespass cases.

But where the declaration complains of breaking
salt 642. and entering the Mf's house & beating his servant
16 Ch 2. 16. with per quod servt the Ct cannot give in evidence
P.C.R. 133. the loss of service for it is not alleged in the decla-
9 Geo 11. 13. ration. In this case the beating is laid
1 Sam 246 merely for aggravation, & a distinct action
(at & note 2) may afterwards be maintained for the injury
2 East 154. done to the servant,

Exhibit 283. The day laid in the declaration is not material
6 & Eliz 32. & this is the case in most instances of pleading a
Esp. Dig 407 day. if one declares for a tort or penal contract.
the day is never material. & indeed the party
is never material except where the day enters
into the description of the fact pleaded

(32)

1 Econ 241. Where a trespass is committed by several the
5 Bac 193. If may declare where one alone is sued that
thi. 2. 1. - the Dft alone committed it or he may declare
that it was committed with another alone
who is unknown.

16 & 17 H. 149. But it is said that if in an action agt A
5 Bac 192. 3. the declaration states a trespass committed
1 Econ 241. by A & B that the declaration is ill for not
1 Sam 246. joining B. but I G thinks this clearly wrong.
salt 32. for clearly one of several joint trespassers may
6 & 7 R. 766. 36. be sued alone. & if in an action agt one
(1 W. 276) it appears in evidence that another was engaged
in the trespass, the Mf may recover. -

The wrong must be alledged to have been committed with force & arms & after the peace & by com: law this defect was one whi could not be cured by verdict. they were at C L matter of substance -

1 Shom. 28.

Salk 63640

4 Bac. H. 3. v. 1.

Pleas b. 1.

Bath 390.

66.-

Bactr i. 1

By 16 & 17 Car 2^o If these words are omitted after after the peace verdict they may be amended & inserted. Still on gvl demurrer the declaration is ill.

Capl. Dig 408.

(2d Ray. 985).

The reason is that by the comm: law where one was convicted of facible wrong a judgement was rendered as for a fine. but if the force & arms & breach of peace did not appear on the face of the declaration such judge could not be rendered to: i. & 21-

St 5 Wm & Mary has taken away this judgment still it is necessary to keep up the distinction between force & arms & case for the purpose of letting in the provisions of this statute, 2d Ray. 985. not come in

In Comt: there never was such a diversity of judgments in case & in force so that these words were necessary here for the reason whi render them necessary at com: law. & it was once decided (96) that the words ri et armis might be considered good omitted & still the declaration be good. but the forms of actions ought to be prescribed & one of them determined that trespass ri et armis & case cannot be joined in one declaration. And I G thinks that the English rule w^o now be adopted in Comt: by every prudent lawyer.

(35)

Declaration in trespass quare clausum.

The injury for wh^{ch} this action is brought must
18id225 be specifically alleged & therefore if the Plf
5Bac174. declare that the Dft broke & entered the Plf's
tricth house at alia enomia feet under the
latter words the Plf cannot prove that the
Dft broke his furniture bc. because the
breaking the furniture is a substantive ground
of action, - and under alia enomia the
Plf may prove circumstances wh^{ch} are not substanti-
18id225 tive grounds of action as threatening to
arise ex turpi causa. But this rule is dispensed with where the action
arises ex turpi causa. for the sake of decency.

(36)

2or230 The Plf must state the value of the injury &
Ep 5ij407 in gen'l he ought to state quantities & the value
1Sid39. + quantity shd be stated large enough for the
5Bac196. Plf may be may recover less than he states
34Edwth can, not recover more. - This rule is
readij6498 intended to furnish a prima facie rule of
bysth 405. damages - When it is apparent from the nature
32d Ray 113. of the wrong that the quantity cannot be ^{not stated} ascertained & no
7Jan2457. But the omission of the allegation of value is aided
2Pth 6. 107 by verdict (it seems) so if the jury find a given
6. 10. 130. sum for damages the verdict impliedly supplies
by necessary intendment what the pleadings have
omitted.

Where trespasses are of a permanent nature that
is when they are such as may be continued from 3 & 6 Eliz 12
day to day & are thus continued all the trespass Ld Ray 240
thus renewed from day to day may be laid in
the declaration continuando from the first
day of the trespass to the last. or he may
trespass declare for each trespass separately in
diff^t actions or in diff^t counts in the
same decⁿ 11. M. m. 296. or 396.

3 & 6 Eliz 12
Ld Ray 240
Salk 638.

Eph Dig 407-
Salk 638.
2 Littl's Extra
Hylly form.

1 Saund 23.4.1.
2 Chitty
5 Bac 197
Dyer 326.

(38).

The principle is that it is impossible to distinguish
each day's trespass or at least very difficult & then
for the law allows the Plf to state with a
continuando. - Ex trespass for entering with
cattle & injuring herbage. The injury of each
day cannot easily be pointed out.

But where trespasses repeated day after day terminate Ld Ray 239
each in itself & being once done cannot be continued 975 623
such trespass cannot be laid continuando. but they Eph Dig 407
may be laid as having been committed varius 3 Bl & C. 1
diesbus et vicibus from such a day to such a 1 Saund 24.1
day. thus if one cuts down a timber tree to day 10 Eliz 258.9
& another tomorrow. this act terminates in itself 638.2
itself & cannot be laid continuando.

And where trespasses are such as might be laid 1 Saund 24.1
continuando it may be laid as having been
committed diversis diesbus et vicibus & the latter is
the procratting practice in Eng? for this is always
safe. The rule that of self every day as trespass made
continuando is merely permissive.

(39)

Declaration in trespass clause

If the Plf declares for several trespasses
2d Ray 240. & one day only is laid in the declaration he
976.7. can prove only one day's trespass. then he may
talk 639. select which day he pleases.
Esp by 408.

There are two modes of laying a continuando
& either may be adopted for all see 5 Bac 197
Cromw Dij Rec b. 2. 2d Ray 240.

639 512. Where the Plf has been ousted & reentered &
2d Ray 435. ousted again & reentered to ad infinitum he
talk 638. may lay three ousting continuandos or diversis
Esp 407.8. dictus & vicibus. or he may allege that
2d Ray 975. the Dft entered on a day certain &
continued in posse until he -

Esp by 408. If a trespass with according to the above distinct
which 639. cannot be laid with a continuando are so laid
5 Bac 199 the declaration is ill, but if some of the trespasses
1d Ray 219. which are laid with a continuando are properly
3d Ray 94. so laid & others not. the declaration is good
2d Ray 239. at least after verdict & I G thinks good upon
demurrer. & is good after verdict if the jury
gives utile damages. so are the continuandos but
1d Ray 28a. vii. which is improperly so laid is good except on
2d Ray 240 special demurrer.

(40) Defences in trespass q:cl-

The general issue in this action is, not guilty, as indeed in all other actions, sounding in tort. or by contract. Where the defence consists in a justification on common law principles he must plead it specially for it is inconsistent with the plea not guilty & the plea "not guilty" means that the Dft did not commit the acts complained of.

Ep^t D^rg 411

bs^t l^t 222

l^t 222

1st Ray 732

Sack 287

Ep^t D^rg 411

Sack 4

Under the St law of this state if it is given in under the guil issue but if justification is given in evidence under the guil issue notice must have been given to the opposite party. In this state this rule is established by the sup^r court - If the Dft has a lease for years from the St, the Dft may give thy in evidence under the guil issue at C^t.

This proves that
the debt has
not entered
on the St's
land -

Accord & Satisfaction is a good defence in this action of trespass but accord alone is not in this or in any other action. By accord is here meant a mere verbal agreement placed at common law.

Sack 288

Strat 73.

Ep^t D^rg 415

This again must at common law be specially pleaded & under our statute the same rule as at common law.

Forward is a good defence & this must be specially pleaded. It admits the performance of the acts complained of - & avoids them. Release is a good plea. This must be specially pleaded both at comⁿ law and under our stat^t. If Dft pleads release he must traverse that he has ~~not~~ committed a trespass subsequent to the release or he may plead not guilty as to any trespass after such a time & as to trespasses before that time a release. & this latter is the more simple -

bs^t E 66

Ep^t D^rg 415

Sack 222

Ag^t 104

1st Ray 222

(41)

Defences in trespass quantum claimans

If an action is brought at law or money for trespass a release to one is a release to all & ^{so it is} 232 who are guilty of the wrong for each is liable for the whole & a discharge of any 5697 115 one is a discharge of what that one is liable for whch is the whole -

It was formerly held that if a Df in an action agt several trespassers entered a not pro 40670 pro one that it was a release to the others 69724 as to one but it was held that if damages were apportioned 18740 but it was held that if damages were apportioned 18740 agt one & then not pro was entered as to another that the not pro did not discharge the one & whose damages are apportioned

^{now} 18740 But the rule is now altered & a not pro 18740 in no case discharges the other trespassers

18740 ~

69724

24 -

21 & 22 1st enacts that the deft. may plead in 547 Str 547 but a disclaimer alleging a tender of a sum 69724 certain as sufft amors & that the trespass was involuntary 18740 only to involuntary trespass & the jury must find that the tender was sufft but at commⁿ law they is not so such a plea at C & w^t amt to nothing we have no such thing up state.

The act of limitation is a good defence & 69724 in Eng^l it must be specially pleaded. The st^t of limitation is three years. To this action however it may be given in evidence under the gen^l issue. That is the Dft objects to testimony of a trespass committed before the

Evidence in trespass (47)

But title in this action cannot be specially pleaded unless by giving colour to the Plf because 3 Dec 1809 unless it gives colour to the Plf this plea amounts to 10.60.90/- to the genl issue and a special plea amounting 4 Dec 1809 to the genl issue is inadmissible. If then Dft Pleas title specially without giving colour 5 Dec 1809 his plea is bad (& will be set aside on motion made to 12.6.1809 for a sh^d Plf demur).

In this state title is specially pleadable by Stat. & the stat provides that when title is pleaded before a single magistrate he must record the plea & recognize the Dft to carry up the record to the County Ct & he must use the same plea in the County Court. & if the Dft does not thus carry up the record he forfeits his recognizance & if he does & fails in his plea he is liable for treble damages & costs. A single magistrate may try the question of title when it comes up under the genl issue —

The evidence in this as in other actions follows. 2 Dec 1809
the ipsu^s any evidence ^{then} going to the merits 2 P. D. 1809
but not embraces by the plea is inadmissible 3 Jan 1809.

But under the allegation alia curonia the Plf 2 P. D. 1809
^{in aggravation} may give in evidence upon the genl issue any 2 Jan 1809.
thing which will not in itself support an action 1 Oct 1825.
in his favour but not of any fact which will 1
itself support an action of trespass in his 1
favour. (ante 31.)

Evidence in trespass quare clausum,
(43.) Where the Plf sets out the abutments of his
Wch 114 close he must prove the land to be substantially
esp^t 117 bounded as he describes.
2 Roll 677

1 Rand 24 n^t Where the Plf lays trespass with a continuance
16th N 258. 9 he must prove trespass within the period laid
for where the trespass is thus laid the time is
supposed to enter into the description - in the
ordinary case the day is mere matter of form

Plt 16. But he may wain the continuance & confine himself
Esp^t Dig 417. 8 in evidence to a trespass committed on some one
day & then he may take any day either before or
after the time laid in the declaration (ante 38. 9)

Sp^t Dig 418. If Plf lays a trespass from one day to another together
ante 7. 9. with an ouster he must then prove a continuity before
action brought or he can recover only for one day's
trespass.

Wch 114. If the Drft justifies & proves enough to entitle him to
Esp^t Dig 414. 8 justification it is sufft tho' he does not prove all that
he alleges.

For the subject of serving damages vide assault & battery
and also Esp^t Dig 420.

(1)

Fraudulent Conveyances (Vol.).

If St 3663 all conveyances made with intent to defraud the creditors & the grantor are as agt then may who are intended to be defrauded & their representatives, void.—

Our Stat in Conn't is similar,

There is a proviso in this statute that it shall not extend to any conveyance to a bona fide purchaser having no notice of the fraud. & the fraudulent intention of the debtor will not make a conveyance to an honest purchaser void.

And this proviso extends to a conveyance from a fraudulent purchaser to a bona fide purchaser for value from the fraudulent purchaser. (Post)

We have a similar statute but no such proviso. It limits the proviso does not affect the construction of St 4051. the Statute. It was made out of abundant caution

The St 27 Eliz exact that all conveyances to defraud a bona fide purchaser shall be void as far as such bona fide purchaser. The St contemplates such a case as this. If A sells his land secretly to B. & that A shall afterwards convey the land to C. for the purpose of defrauding C. who knows nothing of the former purchase by B. this conveyance to C is void as agt C.—

We have no such statute as the 27th Eliz & do not need such a one as will appear hereafter.

Fraudulent The rules applying to one of them etc applies in gen'l to
Conveyancy, both.

Brof 434 Both of them etc are in affirmance of the common law
3. 1. 546. Roberts says that to under such a conveyance void at
2. 62-7. 80 com: law the fraud must be positively proved but if trusts
116. 526. 578. that the proof must be the same at com: law & under the Stat.
3. 6083. It was formerly held indeed that these stat's were in
conflict w^t affirmance of the com: law only so far as to protect
brof 444. a prior creditor.

Bacalfrfc But this doctrine has been long exploded &
1. 28. 66. 90 it has been settled that a conveyance to defraud creditors
1. 10th. 94. is void as well ag^t subseqt creditors as ag^t prior creditors
2. 20th. 600. by the common law as well as under the Stat:
Fall 64. And under the 27. Eliz. there is hardly a
Copy Dig. case supposeable in wh^t the bona fide conveyance
con't. 2. is not subseq^t to the fraudulent conveyance.
4. Day 284. Rob 6-17-20. 194. 5. 1 Root 324.

66072. But such conveyances are valid indeed as between
3. Mar 22. the parties themselves. both at comm: law & by the
brof 270. espcl words of the Stat.

brof 445.

Rob 33. 641. 657. 1 Root 104. 489.

The com: law w^t not indeed enforce.

5. 660. And a conveyance within the 27. Eliz. is void as
bon^t 711. ag^t a subseqt purchaser even if he knew of the
2. 38th. 145. prior conveyance. now where actual fraud was intended
9. East 59. 74 in the prior conveyance the rule is proper but when
1. W.R. 335. the only objection is that the prior conveyance is
4. Bus 375 voluntary the rule is harsh. but the rule is well
1. Feb 271 established. — The St & C.L. go on the supposi-
R. 16. 17. tion that the subseqt purchaser is deceived & w^t
to be defrauded if the first were not set aside,
extra 72. John 2. 536. 1 John Ch Repart 261 S.C.

✓ And in equity a subsequent purchaser for value under fraudulent
an extry agree having notice of a prior conveyance Conveyance,
witht value can not hold tho' if the subseq^t purchase Rob 233-4
 had an actual conveyance even in equity he will 507 u.t.
 hold. - But in the first case he has clearly 2.8.6.14.9
 no equity & therefore will be left to his remedy
 on the extry agree m't at law.

✓ Fraudulent conveyances are in fact almost always 3.9.2.10.
voluntary but they are not necessarily so. for if 2.6.6.2.20.
 a debtor makes a conveyance of land for its full 3.6.8.1.6
value but both privy to the fraudulent intent 2.6.6.4.8.1
 the b/s will hold in preference to the fraudulent Rob 23-7.4.9.
purchaser. & so will a subseq^t bona fide 5.4.7.8.
purchaser for value,

And the same rule holds of a judg'. R.6.4.9.0
 suffered by collusion where actual value is
 given -

In some cases arising under this st the fraud
 is actual. & that there is a fraudulent intent.

In others the fraud is constructive, thus a voluntary
 conveyance tho' no fraud is intended is frequently
 deemed in law to be fraudulent - or it is
 constructively fraudulent.

✓ And even where the fraud is actual it need not Rob 35.
 be proved that the b/s or purchase shd be actually
deceived. It is sufft. that the conveyance was with
fraudulent intent - such at least is the rule
 established in the books.

(4)

Fraudulent Conveyancy,

This intent to deceive may be inferred from various facts which are called badges of fraud.

4 Inst 374. One of the most common facts from all the ⁱⁿ but
5 Inst 602. of fraud is rendered probable is that the conveyance
1 Eq. ca 334. was voluntary. & the fact that that the first
11m 6285. conveyance was with value & that there was a second
Consp 280. conveyance with value, is suff' evidence that the first
3 & 6 & 1148. conveyance was fraudulent,
R. 1633-5.

Rob. 46. 7 It was formerly thought that if a conveyance was
160. 93. 6 made to defraud a particular creditor that that creditor only could take advantage of the fraud.
Palm 415. but this rule is now exploded. & such conveyance defeats
C. L. 53. 8. 60. no one of the creditors. — The it evidently means
2 Inst 105. etc. that the conveyance shall be void as to all
standing in the situation of the C. intended
to be defrauded.

Rob. 53. 960 Under the 27th Eliz. the fact that the grantee was
Consp 711. indebted at the time of conveyance is a badge of
fraud. but this is no badge of fraud under the 27th
Eliz. — If A then embarrassed with debt
conveys his land to B. & then to C. the fact
of embarrassment is no evidence of fraud in
favour of C.

(5) 1 Inst 100. 237 It has been a great question whether the want of
178. valuable consideration is only a badge of fraud or
2 Inst 105. whether the want of such consideration per se makes
1 Inst 119. the conveyance void

1 Feb. 486.

2 Inst 444.

Inst 434. 705

C. L. 13. 15. 18. 61.

60. 395.

That the voluntary conveyance is per se void as ap. etc.
9 East 59. 65. Decr in Ch 13. 2 Ver 10. 2 Verm 261. 2 Bl 1019.
Eq. ca 234. Rob 194. 204. 626. 628

According to the first class of authority it is held Fraudulent
 that the fact that the conveyance is voluntary. Conveyancy
only evidence of fraud under both 27 & 40 Eliz.

But according to the latter class, the want of value
 consideration is under the 27 Eliz. conclusive evidence
of fraud independently of any intention. & the be
pronounce it not as matter of law, but none &
 then desirous go to the 13 Eliz. - The case of Doe
 & Manning has settled this question,
thus - If a makes a gift of his property & then
it for value the subject purchaser will hold as matter
of law.

The question then arises whether a conveyance of 18th 15.
 property without value is fraudulent as against creditors 21st 10.
 is per se fraudulent as matter of law. 30th 14th
 21st 32d.

The better opinion is that a want of consideration 5th 20th
 as against creditors is only presumption of fraud for 28th 17. 6. 190.
 it has been repeatedly decided that a reasonable 4th 388. 393.
 family settlement by way of advancement is good 395.
 as against creditors if the grantee was not embarrassed 10th 344.
with debt at the time of making the conveyance 21st 357
 and if there was no proof of actual fraud. & no 87. 82d 9.
particular mark of prospective contrivance - 86. 70th 3. 370.
 44th 4432. 5th 1.
 5th 65.

This doctrine has been acknowledged in Conn. 10th 4. 620.
 & in Mass. but denied in N.York. 9th 14th 370.

11. 14th 11.
 3. 1st 14th 15.

Fraudulent Conveyances may in England go to a great extent, in that case it was held that a reasonable family settlement made by a man not embarrassed (but indebted in a small sum) was void as agt. subseq. creditors but this neither appears to be justice or law.

2. 4th 152. The case of family settlement is like only one in 2. 4th 491. wh^t the conveyance with value is good. If a Rob. 451.3 conveyance is to a stranger with value such convey 1. 8th 67.34. and will not be good ag^t creditors. - These family Robt 452. settlements are supported by good consider.

2. 7th 890. What is meant by the word 'indebted' in these rules? 2. 7th 421. It clearly means 'embarrassed with debt'. It can 1. 8th 2. 525. be no evidence of fraud that a man (John and) owns small debt & if they are it might as 3. 93. well be s^t that such settlements are always void ag^t creditors. 2. 8th 434. Marriage is always regarded as a valuable 4. 6th 24. 388. consideration & cannot be set aside by subseq 3. 93. purchasers or by creditors. - 2. 6th 103. 5. 200.

509.

2. 8th 6th 297

4. 6th 383. Conveyances in consideration of marriage are held 2. 6th 275. entitled to the benefit of the 2^t of a prior fraudulent 3. 77. conveyance - This conveyance is treated in almost 2. 6th 398. every respect as a conveyance founded on 2. 6th 105. 103 pecuniary consideration - 3. 67. 502. 3.

1. 10th 784. But according to some opinions there is a diff in one 2. 60. 34. 6 respect between marriage & other valuable considerations 4. 6th 132. if a conveyance is made to a B & C for a pecuniary 2. 6th 192. consideration recd from A only. A B & C are entitled to 2. 6th 175. 50 the benefit of the consideration but if in consideration 2. 6th 113. 453. of marriage a conveyance is made to A & his wife remainder 2. 64. to collateral relatives. then latter are not protected by the consid?

Fraudulent Conveyancy (7)

To the contrary opinion there are many authorities 46n398
viz that the collatals are protected by the consid^d 2 Lev 105
of marriage. Hards95. Court 711. - Ques 21. 21 May 175

The party making the settlement has 46n319.
not as in the other case rec^d an equivalent
for the land - wh^{ch} will be a fund for the
paym^t of debts.

But a settlement made after marriage & in consideration 287
of a prior marriage it is always considered as a 2 Br 66 148
voluntary conveyance th^t therefore will in gen^r be Rob 18. 213
fraudulent under the 27th Eliz. but such settlements 2 Vols 10
where the party making them was not involved in 2 2d 520.
debt at the time of the settlement have been Rob 18. 24. 187
protected under the 1st 13 Eliz. 191. 228.

But if the party making the settlement was
embarrassed at the time the settlement will be
void under the 13 Eliz.

8. It may be remarked that bona fide purchasers Rob 895. 6. 167
are more favoured than bona fide creditors in 187. 194.
the construction of their statutes. 2 Vols 327.
for bona fide purchasers who are entitled to the 564.
benefit of 27 Eliz advance their money for the
specific thing itself which has been previous^{ly}
conveyed voluntarily a fraudulently but the
creditor advances his money on the personal
responsibility of the debtor. - The case is analogous
to a mortgage & a gen^r creditor. Portell 234

(9) Deceitful Conveyance - Marriage Settlements

Put a settlement tho' made after marriage of
1 Reg ca 354 made in pursuance of an agreement made before
3 Feb 66. marriage is not considered as voluntary & is
1 Vent 193. supported under both Statutes. - This however
2 Feb 700 is a rule of Equity only. - The original agreemt.
Rob 218. 243 was in consider of a future marriage & therefore
Str 237. good - this consider extends to the Subseq^t settlement.
Rob 288. It however the settlement made after marriage
2 Feb 146. varies considerably from the agreement it will be
1 Nov 285. supported only so far as it conforms with the
Rob 245. original agreement made before marriage -

2 Feb 248. And the settlement made a^r marriage will
1 Nov 4. 196. be supported under the Statutes if made in
2 Rob 304. pursuance of a parol agreement made before
Str 236. 728. marriage. for the st^t of frauds extends only
Rob 220. to the parties to a parol agreement & has no
concern with the trs & bona fide purchasers
The party to the contract may waive the
benefit of it. & strangers cannot object.

3 All 69 But if the settlement is not actually executed -
Rob 281. marriage & if there is nothing more than an
2 Ves 304. 9 etoy agreement made before marriage Equity will
10 Plumb 622 not enforce this etoy agreement as ag^t bona
Rob 27. fide purchasers with notice but will enforce it
ag^t the creditor or of the settlor. for the bs have
no lein on the land but the wife & issue have
a specific lein. - But between the wife &
& bona fide purchasers the equity is equal
& the latter has the legal title.

(11)

Marriage Settlements, Chandebent Conveyance

Value a settlement made after marriage even with
any agreement made before marriage & with valuable consideration 2 Vols 10
consideration will be supported as^t subsequent to 24th May 1868 24th May
if the settlement is reasonable or if there are Robt. 24.
^{no} badges of fraud, as being enburased with 1871, 1, 227 m
debt &c.

There are many cases falling under these general
rules that are modified by particular circum-
stances.

(12) A settlement tho' made after marriage &
not in pursuance of a previous agreement if founded
on new & valuable consideration will be Princibl 222
supported under the St's 27 & 13 Ely. 2 Atk 417

Thus if a portion accrues to the wife See in Bl 425
the husband in consideration of the portion made 2 Ltr 146
a settlement thus settlement will be good in 2 Cal 64.
equity. For here is an actual valuable 1 Robt 16.
consideration. This is too precisely what 2 Atk 477
equity w^t in genl compel him to do. Robt 222: 3:
252. 3. 262-72

So if the portion is given by wife's friend 2 Vols 18
so if the settlement is in considerⁿ of an agreement Amb 121
to give a portion (q)

(13)

Fraudulent Marriage Settlements

Cavegancy

1 P.M. 383

26th 420

3 P.M. 305

26. 277. 9

288.

Proc in 622

1. 4th 190.

Amb 121.

26. 280-5.

Where the hus. is obliged to apply to a Ct^t of equity to obtain the wif's property & is obliged to make a reasonable settlement by that Court as a condition of that court decreeing in his favour the settlement will stand both under the 13 & 27 Eliz. The settl^t is the means by wh^{ch} he purchases the enj^t of the wif's property - it is done under sanction of a Ct^t.

And the same w^t be the case if the trustee refuses to decline the wif's property unless the husband will make a settlement on the wife & the husband makes such a settl^t. t^t & it be reasonable the settl^t will be good under both Statutes. For 1st Equity w^t have compelled the settlement to be made & 2^d he thus purchases the enj^t of the wif's property.

Proc in 6244. And yet in this very case if the trustee had 1 P.M. 639 voluntarily delivered up the wif's property 3 Do 11. & then the husband sh^t voluntarily make a 1 Nov 539. reasonable settlement this settlement will be 26th 67. 420 void as ag^t bona fide purchaser but still good ag^t ~~wife~~ b^r. if the husb^d is not involved in debt &c,

21st 16. But if the trustee sh^t require a settl^t exceeding 26. 285. 27 what a Ct^t of eq^t: considers as reasonable it will be 395. 6. void quondam the recd^t. & void quod the eq^t in favore of creditors.

26. 285. m.

1 P.M. 579.

31st J. 506.

What is reasonable must be determined by the direct^r or of the Chancellor.

(15)
Fraudulent

Conveyance

These rules relating to trustees apply equally
to an executor as such, as of her father's executor Stra 239
for the exec is always a trustee - & If the 2 Vesp 18.
wife is entitled to a legacy under a will 2 Atk 420.
& the exec insists on a settlement - for a Prent 6 Bl 548.
legacy is not recoverable in a Court of 30 Wm 11
law. Rob 285. 8.

If the wife has an equitable title to a chattel
real the hus: may dispose of it free from any 16 M. 7. 18.
condition imposed upon him in law or in Equity 2 Vesp 270.
for he has the legal title to her chattels vell 2 Pmm 222.
4 Vesp 4. 353.

Hence if a chattel real is held by a trustee Rob 299. 662
& he refuses to deliver it up with a settlement 30 Wm 222
and a settlement is made by the hus in pursuance
of this condition this settlement is voluntary
and will not be supported under the Statutes.

It is not very easy to see any reason for
this rule. But it seems clear from the authorities
that Equity will never impose terms on a hus:
when he comes into that ch: for a chattel
real of the wife.

And there are some cases in which dispositions of 2 Pmm 357
property by a feme sole will be fraudulent & void Rob 634. 557
as of her subseq: husband. in equity & in eq: only
these rules are in equity founded on principles purely
equitable & not on the Statutes.

(16.)

(17)

1st If a woman before any treaty of marriage
Feb 66345.30 reserves an exclusive dominion over her property
1801.422. with a ~~genl~~ view to a future marriage, if the
2 Feb 194 husband makes no settlement on the wife ~~she~~
266354 cannot set the conveyance aside even tho' the
husb. has no notice of the conveyance.

2 Feb 66345 But if the conveyance were made pending a
2 Nov 7. treaty of marriage or in contemplation of a
1 Feb 259 marriage with a particular person afterwards
2 Dec 292 married. if he has no notice of the conveyance
it will be void as agt his wife even tho' he made
no settlement on the wife.

(17)

2 Feb 11. m 533 2nd if the husband has made an adequate settlement
266259.357 on the wife he may be relieved in the same
fost suppond as this conveyance on the ground
of fraud inferable from his want of notice.

3^d If a woman in contemplation of marriage & pending a treaty makes a conveyance for the support of children of a prior marriage. this conveyance will be good even tho' the husband had no notice. 13th 257 20th 357 £100. 12th 265. Comp 705. Rob 359.

And this rule holds tho' the husband has made a settlement on the wife. for it is a moral duty of each for her to provide for her children.

And such a conveyance too has been held good w^t creditors & bona fide purchasers. but since the case in last it may be questioned whether it would be good as w^t purchasers. 12th 268. Rob 360.5 29th 59.65.

4th If a husband has made a settlement all over induced by an intentional concealment of the conveyance to the children & by holding out false appearances. the settlement on the children is void. 2 Oct 244. for here is a positive fraud.

I. I think it w^t be more equitable in this case to set aside the settlement made by the husband to the wife.

(19).

To justify a C^t of equity in setting aside
2 S. 62350 any conveyance by the wife, there must, in
Rob 3547 genl, be actual fraud.

1 Rob 6259.n 5th If a woman, on the eve of marriage,
2 Rob 264. makes a conveyance (voluntary) to a stranger,
Rob 352. the husband, if he had no notice, may clearly
set the conveyance aside, whether there is
any fraud or not.

3 Rob 74. And then are cases on the other hand in wh^{ch}
65. a wife has been released by clandestine agree^t
Rob 1131 made by the husband in disappo^tntment
Rob 350.n. of her expectation. (vide "powers of Chancery"
1 Rob. 136,

3 Rob 81. Who can take advantage of fraudulent conveyances -
Conf 705.11. The general answer is no other than a bona fide
Jal 664. purchaser can take advantage of 27th Eliz
3 Rob 356. If then A makes a fraudulent conveyance to
1 Ban 396. B & afterwards makes another fraudulent conveyance
Rob 369.382. to C. C cannot avoid the former - the rule will be
425.6.64.65. the same as they only constructively fraudulent
in voluntary.

And a purchaser under a family settlement made in consideration of natural affection &c only cannot sue 360836. aside a prior voluntary conveyance tho' made to a ~~stranger~~ 608245. stranger. for tho' the latter are bona fide purchasers Rob 370:1. yet they are so witht value. 641. 33.

The same rule holds in case of a jointure settled 608445. upon a married woman after marriage. if made before 606371. marriage the rule w^t be off.

But where one purchases for valuable consideration mere 606371 inadequacy of price will not prevent him from avoid. Comp 705.10. ing a prior voluntary conveyance.

But gross inadequateness of price amounting only to a 2 P.M. 618. colourable consideration is an objection to taking Comp 713.10. advantage of the stat. Rob 373.

(21)

360. 53.6.
610. 544.
110. 572

And if a subseqⁿ purchase for value & with an intd.
equate price appears to have overreached the grantor
in the transaction he cannot set aside a prior
voluntary conveyance.

2. 450. 272. The Statute of Frauds extends to a bona fide mortgagee
60. 270. who is by the Statute enabled to set aside a prior volunt-
110. 289. conveysance.

110. 373.

8. 03. 92. And the same rule holds in favour of any incumbe-
110. 2. ncees as the consequence of a Statute staple &c for they
have a specific lien upon the land.

110. 373. 657. But a mortgage is in equity a purchase only for security
10. 03. 53.6. & only to the extent of his debt so that the prior
219. conveyance is void only *pro tanto*. i.e. the prior voluntary
incumbece may have the lands by paying the amt
of the mortgage debt. - (see part 60)

(23)

Fraudulent Conveyances. No. 2.

(23)

The opinions are contradictory on the question whether 2 Ser 70
a mere party to whom a lease is made as indemnity 5 Co 24.
is a purchaser within 27 Eliz. 4 Hlt. St.

The weight of Authorities is in favour of the Party. 2 K. & C. 199

Rob 405. 6.

2 Dyer 205. a

Rob 6374.

2. Robt 783.

In this state a surety would not hold under an
absolute lease, for one who has held that an absolute
conveyance to a surety where indemnity may be
intended is itself void.

(24)

Where a valuable cons^t is paid by the party claiming Rob 6376.
the protection of the Stat it seems to be immaterial
what species of right or int^d is purchased in whether
it be a positive int^d or the extinguishment of an int^d.

(25)

And it is not material how large a small a bona
fide sale for value is. Ex gr. a lease for years may
hold agt a prior voluntary purchase of the fee, tho' the
prior voluntary purchase w^t undoubtedly holds the Rob 6376. 7.
fee after the determination of the lease.

2 Robt 377

2 Robt 619

3 Robt 181

Rob 6376. 7.

2 (26) If A makes a fraudulent conveyance to B & afterwards
2 Verm 473. a voluntary conveyance to C. & C sells to D for a valuable
Rob 383:4. 498:9 consideration. D cannot avoid the prior fraudulent
658. conveyance to ~~B~~. for C conveys to D only his ^(C's) interest
Moore 602 533. but between B & C. C has no interest.

(27.)
30 Mord 22 A trustee under a voluntary settlement, cannot become
Rob 389. 500 a bona fide purchaser so as to defeat the voluntary
settlement by, for it is a breach of trust in the trustee
to purchase.

(28)
Nov 105.
Rob 391. A person who makes a purchase in his own name
with the money & for the use of another is a purchaser
within the Stat.

(29)
Rob 227:4 This Stat extends as well to personal as to real property.
1 Day 258. but where there is a vol conveyance of money or other
personal chattel if it is consumed or transferred to
a third person before the 6 mo. taken in est^t his
remedy as to the particular prop is gone forever
& the same rule holds of a purchaser.

nor can Chancery in such case give any remedy

And the consequences w^t be the same if the prop^ce^t
not be found.

However one remedy is still left for him he may sue
for the penalty under the Statute

According to some chancellors, a voluntary gift of 1 Eg:ca 44.9
money is not within the 13^t Eliz. 2 Venet 490
Rob 4244

On the ground that money cannot be taken in
Ex^t (see title Octo: 18)

But money I think can be taken on Ex^t, p^r Ex^t, via 1 branch
also Ex^t & Administrators.

11.134
2 Shrs 166
Doub 210.30.

If a bond be given for separation from seduction it
is void in equity as w^t the obligor be delin. the
good as between the parties. (see vol 48) (post 39)

2 Mls 339
3 P.M. 222
339. Rob 4244
Tall 133.
1 Eg:ca 47
226.180. 258.

And it seems that a conveyance of prop^t for such consid^r.
would also be void as ag^t bona fide purchaser & bnd^r

It is a frequent practice for debtors to convey their
(32) property to trustees for the payt of debts.
1 Leon 194 Now it has been decided that such a conveyance when
2 Vern 570. no creditor is party to the deed, is void as agt disputing,
3 Rob 249. creditors & as agt subseq^t bona fide purchasers for the
4 29. 30 trustees are strangers to the valuable consideration

4 Day 146. 395 The rule is directly the reverse in this state in
2 Conn 633 this state the brs are presumed to a part until the
2 Root 26 contrary is shewn.

1 Stru. 165

3 6. 26. 7

3 6. 81 But in Eng^t? if any one br is party to such conveyance
5 70. 420 the conveyance is supported by valuable consideration
1 Burr 478. and is good as to all the creditors. that is the
8 72. 231 brs can not take the property conveyed on &c &
5 72. 235. 420 thus set aside the conveyance to trustee. & if
4 78. 167 the conveyance is to trustees one of the creditors
1 Camb 148. being one of the trustees in trust for the payt of
2 Claptr one half of his creditors. is good & the omitted brs
1 Pinney 502 can't set aside the conveyance.

5 72. 426. 530

2 John 226.

1 John 156.

5 Do. 413

3 Day 340.

4 Day 146.

A conveyance or assignment of property to trustees
made in a neighbouring state according to the law Nails v
of that state is good in this state. *lex loci sc. Huntington* 1811.

3 Dakap 370

2 Collap 89

1 A.B. 665.

4 T.L. 182.

Conf 175. 343.

3 Branch 73.

5 East 124.

If however some of the effects of the b & some of
the bres. in this state. & if the assignment were by
a positive law forbidden then the conveyance in the
neighbouring state w^o not I trust be valid

And such a conveyance for the part of debts 26432.3.
when valid according to the rules laid down is 5 Ban 2620
valid it seems tho' the debts secured by the bres. L 54 H.
conveyance are barred by the st. of limitation. Doug 629.

2 Burr 1099

3 T.R.H. 24.

and it seems that a conveyance to pay 29 B 340
debts barred se ipso facto revives the remedy Ep. Dug.
& removes the statute bar,

(34)

Fraudulent

Conveyances If after a conveyance to creditors by way of trust
3 P.M. 222 & none of the creditors are trustee & the creditor
Rob. 434 bring a bill in chancery to compel the trustee
1st R. 33. to perform the trust & a decree is made the
decree validates the conveyance ab initio.
The conveyance by this decree requires the
unction of a Ct. of competent jurisdiction.

(35)

1 P.M. 265 Donation to charitable uses are in general void
421. 675 as to br. if the donor is indebted at the time/
1 Nov. 230 construect 43 Eliz. - It is not settled that
264. 38. such donation will be void if the donor
was not indebted at the time tho' afterwards
becoming so, &c.

Here if the donor be not indebted at the time
the donation at sapra is void agt subject
creditors. In this country such donations
must stand on the same ground as a
voluntary conveyance to a mere stranger

(36)

Chap. 2. Donatio mortis causa must be void as of
Rob. 442. 4. course creditors. for it is testamentary but of
1 P.M. 406. course good agt the representatives of the
1st. III. donor,
Decr. 111.

In chancery a conveyance to trustees for the ~~pay^t~~ ^{Conveyance}
 & debt is not void as agt w^t self claiming ^{et} 15. v. 4449
delecto the conveyance was made ~~late~~ ^{pendente} Robt 44667
 for the express purpose of keeping it out of the 57415.
 hands of the plf. for the Plf is neither a bnd.
 nor a bona fide purchaser.

But this rule is not very satisfactory.

But if the conveyance had been made after judg^t 166573.4.
 recovered it w^t be void. tho' et^r had not been 577.
 issued - for after judg^t the Plf becomes a 1665747
 creditor.

137. A voluntary settlement made between the date Decr 16377
 & the breach of a covenant where the covenant gives Robt 44661
 a right of damages only. the settlement is not void
 unless there is actual fraud. Ex a/c. The Corts in
 a deed of Conveyance - No debt exists at the time of conve-

But this applies only to a covenant wh^t gives a
 right to damages only. but if the covenant was
 for the pay^t of a sum certain at a given time. the
 rule w^t be diff^r for here is an existing debt

Fraudulent

Conveyance. In Robt 4637 it is to be conveyed to
Brobusson the originally, as to a son the conveyance is
void & not so as to the creditors of the father unless
Robt 4637 it appears to have been purchased in trust
1777/11/68 for the father. in the father holds property
2 Edw 4/15 during the minority of the son. for he takes
1 Robt 4637 of the land as guardian for the
son - tho' if the son had been an adult this
prop^r w^t have been evidence of a trust.

1777/11/68. 1st under the English Bankrupt laws in such a case
Robt 4637. the creditors may take the land

Robt 4637. 2d, if one has a power over property in
Robt 4637 another's right a conveyance of it by the former
cannot be fraud^c us of his creditors.

2 Edw 4/15. But if one having a power over another's property
Robt 4637 conveys it in trust for himself his creditors may set
Robt 4637 aside the conveyance (ie may set aside the
Robt 4637 conveyance made after & in pursuance of the
Robt 4637 trust. for the hus^r has the equitable just
by this conveyance in trust for himself -

And whenever one having a new house & without conveyance
ment own b^t makes a voluntary appointment set^r to A
is in equity void as ag^t creditors of the Appointor Prec in Ch 50
Ex. It devises to A the power of disposing of 22 a^r 0^r 0^s 0^d
his (B's) property as he pleases now if a convey^r Exch 319.46
voluntarily to B - The latter cannot hold ag^t. Exch 269.65
as creditors - for the property is virtually the Exch 457
property of C. It has a right to make it Exch 6472.77
his own

The validity of voluntary bonds is generally tried Prec in Ch 7307
in equity. In the life time of the obligor, the Exch 293
question cannot be tried at law unless Exch 6475.
the obligor's property is taken ^{in exec^r} But in Eq. Prec in Ch 370
a bond merely exec^r may be postponed

But after the obligor's death the question is frequently Exch 6475.10
tried at law? As the cred^r sue the Exec^r D.
the ex^r or pleads this bond outstanding in
bar the cred^r may reply her fraudens &c

The fact of a bond remaining in the hands of the Prec in Ch 370
obligor is a strong badge of fraud, or at least Eq. ch 206.
raises a strong presumption that it is Exch 625.
1877 May 7
(Ch 646.5.)
656.7.
Prec in Ch 12.

(41)

Fraudulent

Conveyancy

T. Hk 625. But such voluntary bonds are in gen'l good as
 apt more volunteers. as exec. legatees & those claiming
 1 Munt 427 under the st^t of distribution. & the obligors admiss.
 2 Ne 574. & by this cannot set aside a voluntary or fraudulent bond
 3 P.M. 1220 unless for the purpose of paying the debts for bona
 Rob 485. 6. fine creditors. If then an exec' is sued
 643. 661. on such bond he must plead not only
 (ante 14. 19) that the bond is fraudulent but that
 20. 54. 5 there are outstanding debts, &c -
 61 /

(42)

Brac in sh 17

2 Verm 202.

2. 6 489. 90.

If a bond etc is voluntary or fraudulent a judgment
 confessed upon it is also voluntary or fraudulent
 for the st^t includes as will fraudulent judgments
 as fraudulent bonds, &c.

4 Oct 327

Rob 489. 90.

as to onus probandi if a judg'g claims to be fraud
 is obtained on confession the onus probandi lies on
the party in the judg' but when a judg'g has been
 obtained on trial the onus probandi lies on the
 party impeaching the judg'

3 Dec 235. 420 The mere preference of one C^t to another does not.

3 Day 340. render a judg'g. or indeed any contract void under

4 Rob 146. the 13th Eliz.

1 Oct 5436. The English Bankrupt law indeed modified
 1 Barn 407. 77 this rule. But by the C^t a man may give
 2000, £ 185. a preference to creditors. & when he does

Conf 629 § 3 P.M. 296.

103. 66 100. 190 But the C^t can give no such preference except

Rob 492 between us. in equal degrees. invent. 329.

1 P. 100.

A conveyance void in its creation may become good Conveyancy in favour of a bona fide purchaser by matter of fact. ^{1 Sid 133} ^{106495 435.}

Fraudulent
1. It conveys fraudulently to A & afterwards conveys ^{ctd} ^{1ta 243}
to B a bona fide purchaser with notice & then conveys ¹⁰⁶ ^{3 Dec 187}
to C. B will hold the ¹⁰⁶ ^C is a bona fide purchaser. ^{6 Oct 1822.}
as well as B. for he will have made the bona fide conveyance ^{244.}
for value to B. & then conveyed to C. B would have held ¹⁰⁶ ^{1 Oct 185.}
act. C. and as the conveyance from A to C as between ^{1 Sid 40.}
the parties is good. C has the same right to sell which A ^{1 Jul 1852}
has & indeed stands in the place of A.

The rule is the same under the 13th Cls.

If then if a debtor makes a fraudulent conveyance to A privy to the fraud & A conveys to B a bona fide purchaser with notice of the fraud. B will hold ^{9 Ves 2/190} ^{1 Aug 1857}
act. the cred. of A. & on the same principle viz ^{106 187.} ^{10 John 187}
that the grantee C has all the rights which ¹⁰⁶ ^{10 John 187}
had before the fraudulent conveyance. and such a conveyance by A would have been good. ^{184.5.}

This conveyance to B is within the proviso ^{3 Binsay 84.}
in favour of bona fide purchasers ^{10 Oct 185.}

^{3 Dec 1851}

^{18 Oct 1855}

^{13 Dec 1871}

In this state it has been determined in the case ^{16 Conn 1557(4)}
of Weston & Gronfoot. that the creditors could ^{3 Chancery}
hold act. B in the last example. but this decision ^{reversed}
would I think not now be considered law. ^{12 John 1855}

^{13 Dec 1871}

^(P.C. 184)

(45)

Fraudulent

Conveyance

Bro 4453.

Zobcl 65.

2 Bab 225

Rob 6517: 18

of conveyance originally good cannot become fraud by matter of post facto. Ex gr. a bona fide mortgage permits the mortgage to remain for a great length of time ~~this~~ does not make the mortgage fraudulent (tho' it may perhaps be a badge of fraud.) & indeed the grantor remaining in possession is generally a badge of fraud.

(46)

4 May 284.

2 Bab 63.

1 Bon 6322.

Rob. 521.

A fraudulent grant can never become legitimate in favour of the fraudulent grantee even by any length of possession. (Black & Cawley) of a debtor makes a fraudulent conveyance to D. D continues in possession 30 yrs the creditors of D may still take & hold the land agt D.

for D's possession is fraudulent. & to allow him to acquire title in this case w^t be to allow him to acquire title by continuance of fraud.

The parties affected by such fraud must be dispossessed. but the creditors of D never had a right of possession & therefore were never dispossessed & therefore they cannot be barred.

Time never bars a fraud. Salt 63.

(46)
Fraudulent
Conveyance

1868.
36082.
56077 a.

The 13th & 27 Eliz. are like all stat. of fraud construed liberally so far as they act upon the fraudulent transaction, but so far as they inflict ^{penalties} ~~penal laws~~ always are "M. Saw 19-22" 1868. 36059. 78. 36052. 56077 a.

In construction these stat. have been held to include cases not within the terms of the statute, i.e. the letter of 18 Venta 257. Thus where tenant for life committed a forfeiture Rob 6590 that the reversioner who was privy to the fraud might enter & defeat the creditor of the tenant for life now this forfeiture has been held void as against the creditors of the ten. for life. —

- (47) Badges of Fraud. 36081.
- 1^o The fact of the grantee being genil including all more 688 the grantor's property, is a badge of fraud as regards Rot. creditors.
 - 2^o The fact of the grantor remaining in possession ^{37 & 620.} after an absolute sale, for any considerable ^{Rob 197. 200.} length of time. — This indicate a trust — a sham ^{548. 555. 71.} sale — ^{Ld Ray. 252. See in Bl 286. 1 Vis 245. 456. 1 W.C. 44.}
 - 3^o The fact that the grant is made in secret. Rob 559
 - 4^o Where a conveyance is made pending an action for a debt ^{for a debt} of the grantor. (under 13th only) 1 Vern 459. Rot 578.
 - 5^o The fact that there is an apparent trust between the parties. If the trust is established It clearly is a fraud —

57
Fraudulent
Conveyancy

Badges of Fraud

6th suspicious clauses in the conveyance, as "this deed is made bona fide &c"

7th a conveyance made in the absence of the grantee to a stranger. (not in all cases)

8th the grantor retaining the deed in his possession

9th the grantor being involved in debt. this applies chiefly to the 13th Reg.

10th a clause of revocation. (Strong)

60 St. Rob 456. 558. 559. 611-641.

There may be other badges than these but these are the more usual. These are all mostly conducive to prove the 8th badge which is the strongest badge or the apparent trust means merely a sham sale. but even fraudulent conveyance is not of course a felicitous sale. for a conveyance may be fraudulent & void where a full consideration is paid if the vendee is privy to the fraudulent intent.

As to the 2^d badge the possession continuing in the vendor is not so strong a badge in the case of land as in that of personal property. But It is a strong badge in either case - The rule supposes that the lack is inconsistent with the conveyance - If there is no trust why does the grantor remain in possession

(49)
Fraudulent
Conveyancy
Rob 548.9
555.

Where the grantor not only remains in posse but
accompanies that posses: with acts of ownership
the presumption is much strengthened. —

Where the grantor remains in possession of land the
presumption of fraud may be rebutted by showing
reasons why the grantor shd remain in possession. 2 Rob 587. 595.
But it has been held that the possession of goods (Rob 563.4)
by the vendor after an absolute sale is per se 558.
Fraudulent. & no proof admitted to rebut this Pres in Ch 287
presumption. — This refers to the 13 Eliz. 2 Rob 225.

But this last rule is frequently contradicted in the
books, & it is held that this possession is only a
badge of fraud. Of this appears to J.G. to be the
better opinion. — both by authority treason, 3 Rob. 81. a
Compl 432
2 Rob 459. 52.
1 Wib. 44.
3 Cap. 22. 52.
Bellot 295.
1 John. 62. 156.
Rob 563. 71.

In this state the question has been decided both
ways. in the sup: C^t —

(50) If immediate delivery of goods is impossible
the want of possession by the vendee is neither a
badge of fraud nor makes the contract per se
fraudulent. Et if a ship or cargo at sea
is sold. But the ship must be delivered as
soon as convenient after her arrival, 1 Atk 160
2 R.R. 462.
1 W. 354. 361.
366.
7 T.R. 71.
1 Rob. 473.
1 Br. 62. 115.

And when immediate delivery is very difficult. n. 8th 7.
symbolical delivery is suff: as where a key of the 7. 71
ware house in wh^t the goods are is delivered to the 1 Rob 563. 20
vendee. Col 550.

Fraudulent

Conveyance has always called a symbolical delivery
but it is a mere delivery of that which
gives the vendee a power over the goods -
of symbolical delivery is the delivery
of one thing as the representative of
another - merely for the sake of making
the contract binding.

The rule appears, in Conn' to be that in general, & except
in certain exempt cases, if the vendee suffers, the vendor
to remain in possession of personal chattels sold, the sale
is deemed in law fraudulent, and the vendee will
not be permitted to show that the sale was in point
of fact bona fide. the retention of, hope by the vendor
after a sale is here treated as in general conclusive &
irrebuttable evidence of fraud. 9 Conn' R 63. 5 Conn' A 196
9 Conn' R 134.

The English cases allow the vendee of property to
(leave the property in) the possession of a former owner
of it, the former owner not being the immediate vendor.
Thus in Guthrie & al v Wood 1 Stark 367, the purchaser of
goods under a distress for rent was permitted to leave
the goods in the hands of the former owner against whom
the distress issued. In Kidd v Rawlinson 2 B & P 59 the goods
of a were taken in Ex & sold by the Sheriff to B who allowed
A to continue in possession, and it was decided that B might
hold the goods agt a subsequent purchaser from A,
see other cases where the sale has been held good because
the sale was made by a third person & not by him in whose
possession the goods were permitted to remain 4 Stark Ex 629
1, M & S 251. 4 Bam & C 652. 8 Dainton 838. 193 Moore 189.

Fraudulent Conveyances (No 3)

Were the grantor or vendor's possession is consistent with the deed of conveyance or with the conditions of the sale & Rule 225. the possession is no badge of fraud.

Rob 558. 540.

As if land or goods are sold on a condition precedent. 561. 147-9.

As also a mortgagor's remaining in possession but a mortgage of goods is void under the Stat 21 & 1st if the mortgagor continues in possession & becomes a bankrupt. Precum C. 287
that is it is void as to creditors of the bankrupt. Bro. Juc. 455.

Shep 65.

Rob 557. 577-9

197.

1 Atk 160.

The Statute 21 Jac 1st is as follows.

If a person becoming insolvent is allowed to be in the possession &c of another's goods the creditors of the Bankrupt may take the goods but this Stat has nothing to do with fraud. Vide Bailment

21 Jas 344.

1 Wils 260.

1 Ves 2444.

Cap 2536.

1 Edw 226.

If a creditor having seized goods on Ex: allows Watson P 123 them to remain long in the hands of the debtor 1 Ves West 5th Ch they are liable to be taken on the ex: of another creditor. but this is under 21 & 1st Jac 1st & this Stat has no force here. yet as it is in affiniment of the common law this rule may probably prevail here.

Fraudulent Conveyance

Another badge of fraud was that the conveyance
160547 was made pending a suit agt. the grantor. this
Rob 573-8. is a badge only under the 13 Eiz.

Dyer 295.a

Sug 18. and a conveyance after judgment has been had agt. the
1605809 grantor and before satisfaction has always been
1720460 considered as a badge of fraud & a strong badge
of fraud -

The cases in all these badges operate as a presumption
of fraud are only where the grantor does not retain
other property in his hands left to satisfy his debts.

16082.

16084.

16082.

16087.

If one conveys his lands ~~with intent~~ to commit a
forfeiture by a crime & then commits the crime
the conveyance will be fraudulent ^{against} us agt.
the Crown or State. This is on the principle of
the common law.

And if one makes a voluntary conveyance & soon Conveyance
afterwards commits a forfeiture, fraud will be deemed.
 inferred, even the express fraud cannot be proved.

Mode of taking advantage of these Statutes.

The party taking advantage of these statutes treats BroE 223.
 the fraudulent conveyance as if it had never been made Dyo 295.
 made, thus the b^r attack the property as the Rob 591.58.
 property of the grantor taking no notice of the 36078.
 fraudulent grantee, and then when the b^rs have BroE 233.
 acquired title they bring ejectment ag^t the grantee
 sometimes indeed recourse is had to Chancery to
 set aside the fraudulent conveyance

Where the question is raised by special pleading the
 property is treated as if no conveyance had been made Rob 272
 Thus a frau^r grantor dies, a b^r brings an action Dyo 119a.m
 ag^t the heir at law, if the heir replies no assets. BroE 233.
 the b^r replies that he has assets to wit the prop^y 56060.
 fraudulently conveyed & proves the fraud. Rob 603.
 BroE 810
 Rob 6591.2.5.

Fraudulent

Conveyances The first & direct step then is for the creditor to attack the property as the property of the debtor & proceed as if no conveyance had been made.

562. If one having made a fraudulent sale of goods or
563. lands dies, then goods &c. are apto & may be
575. seized on the \mathcal{E}^{t} of the cred. or if the \mathcal{E}^{t}
pleads no abs. the br. replies 'apt' & proves the
fraud.

In this state the real property of a person deceased is never taken in \mathcal{E}^{t} the prop. must be sold by the \mathcal{E}^{t} or.

Hence therefore the cred. may claim that the conveyance was fraudulent before the probate & the executors may sell. & the fraud^t grant may be sued in ejectment. or vice versa.

So a debtor having fraudulently conveyed personal property & dies. the cred. can not take the property but the proceeding is the same as in the case of real property.

563. In England if one dies after a fraudulent conveyance
564. of his real property his simple contract debtors
565. cannot take the property in \mathcal{E}^{t} .

Under 13 Eliz. the fraudulent purchase of goods Conveyance
if he takes ^{death} prop. after the vendor's may be consid. ^{by J. 271}
ered as a stranger who intermeddles with the ^{Yelv. 197}
wills. and he may be treated as executor of his ^{2 Leon. 233}

own wrong; For the sale is a mere nullity ^{27. 2. 587}

Or he the creditor may bring his action agt the ^{6. 1. 271}
rightful Ex'or & seize the property fraudulently ^{3 Leon. 57.}
conveyed. at ante. ^{Ex'p. 2. 57. 42}

the first rule supposes that the rightful Ex'or ^{Bullent. 2. 258}
has permitted the fraudulent grantee to take prop. ^{of the goods.} then the Ex'ors can not claim back
the property from the grantee & therefore ex
necessitate res. the c. deta may treat the grantee
as executor of his own wrong.

And the same is the rule if the fraudulent vendor ^{27. 2. 587}
takes the property after the vendor's death with the ^{6. 1. 271}
mission of the Ex'or if he takes the property before
probate of the will. or before admⁿ granted - for
here the same necessity exists There is no other
way of recovering the goods

If the vendor takes the goods after the vendor's ^{6. 1. 271}
death & with permission of the rightful Ex'or & after Rob. 57. 45.
probate of the will. the grantee cannot be treated ^{5. 1. 33}
as Ex'or of his own wrong. for here is no necessity. ^{Sal. 3. 13.}
for the rightful Ex'or may reclaim the ap'tg.

sed contra in some decisions. according to them ^{Bul. 2. 258.}
the first may in this last case treat the vendor ^{6. 1. 270.}
as Ex'or of his own wrong. And this last appears ^{Ex'p. 2. 57. 12.}
to be the better opinion. tho' perhaps not so
well supported by authority as the former.

Fraudulent Conveyancy In the state it is now doubtful whether there can be an Exec or of his own wrong, for if there can be an Exec of his own wrong the average law w^e be defeated. (there are no cases)

Bro 810. A fraud sale regularly binds the vendor & his Rob 6643.485. representatives yet the Exec or adm^{tr} may claim 661. agt such a sale for the benefit of Creditors. This Bro 270. has been frequently decided in this state. - They can however claim them for no other purpose as for legatees &c,

(58) 56960 If an heir makes a fraudulent conveyance of Rob 6601. an estate descended to him, for the purpose of 2ph 155. defeating the creditors of his ancestor. The Rob 6601. conveyance will be void as agt the creditors of the Rob 6644. ancestor --

Bro 5405. Same rule in case of a fraudulent sale by the Rob 6601. qm Exe or Administrator for the purpose of defeating the C^m of the testator or intestate.

The remedy in the last two cases is in a C^t of equity & that C^t will pursue the property in the hands of the vendee & will treat the vendee as trustee to the creditors.

These bids indeed may seize the prop^y if they can find it, but if they cannot the only remedy is in a C^t of Chancery.

But a bona fide purchaser of the ap'te from the 12th 1663.
Ex'or ad'min'r will hold them agt all creditors 20 Mar 1649.
If the purchaser is honest he must hold Rob Cogu
however fraudulent the intention of the ex'or for he has a right to sell

A fraud^t conveyance is binding on all those
who claim as volunteers under the vendor or grantor. (59)

1663/170

1663/166

360/12.

20 Mar 1649

1664-1.

657/1, 101

Thus therefore where a voluntary grantor attempts by 1663/1658
a collateral act to set aside the conveyance a C^t of equity will sometimes entrapon & protect the 20th 1649
conveyance. This rule will not extend to cases of actual fraud 1663/1658

of actual fraud 1663/1658 (1664 contra)

But a voluntary etoy agreement will not 1. Pow 1634/
in genl bind the representatives for in genl 2 P.A.M. 1641.
it is not binding on the vendor himself Amb 4/6.
+ (18th Ves 1664 contra - + also in this case it was 3 Br Ch 12
determined that where grantor does defeat his own Rot 1660.
voluntary conveyance the voluntary grantee has
no remedy in chancery. 1663/1658 (1664 contra)
(Ch R 7/6 contra)

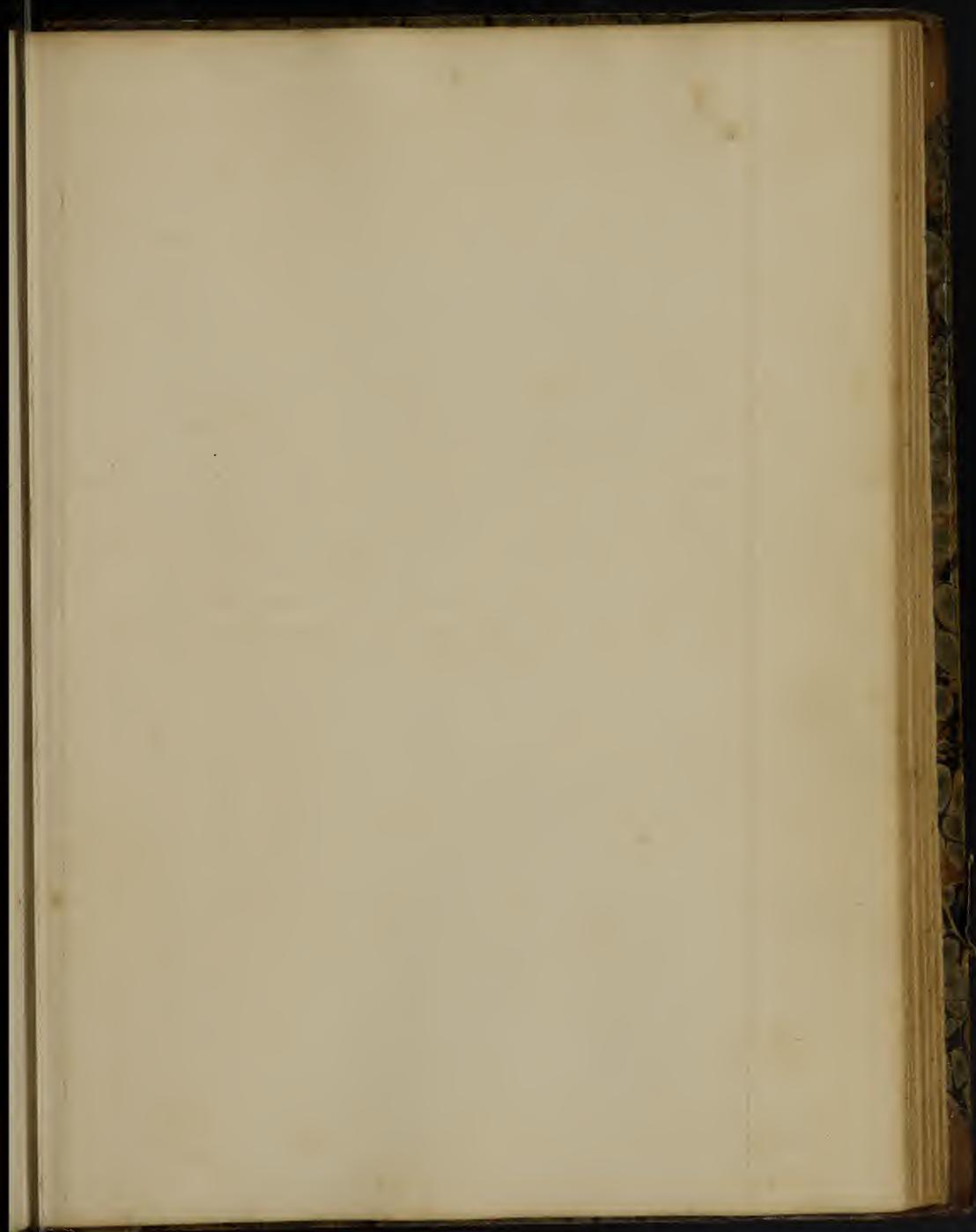
that no one can defeat his own fraudulent
Nim 649. conveyance by his own will even tho' he shd
Nem 100464 devise it for the pay^t of his own debts. & if
132. the will were made before the fraudulent conveyance
Rob 649. 652. the will will be walked by the conveyance
654.

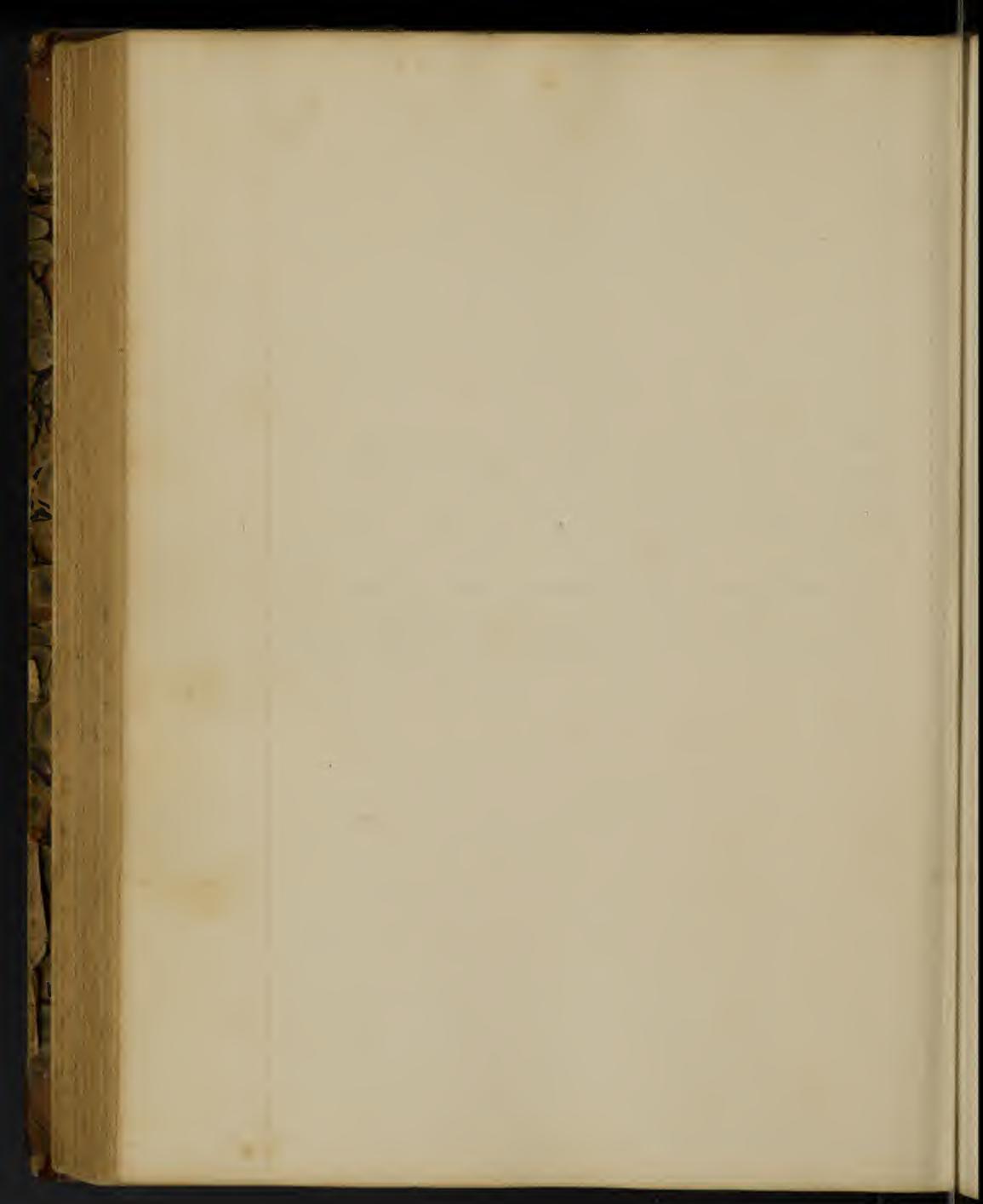
1646 625.

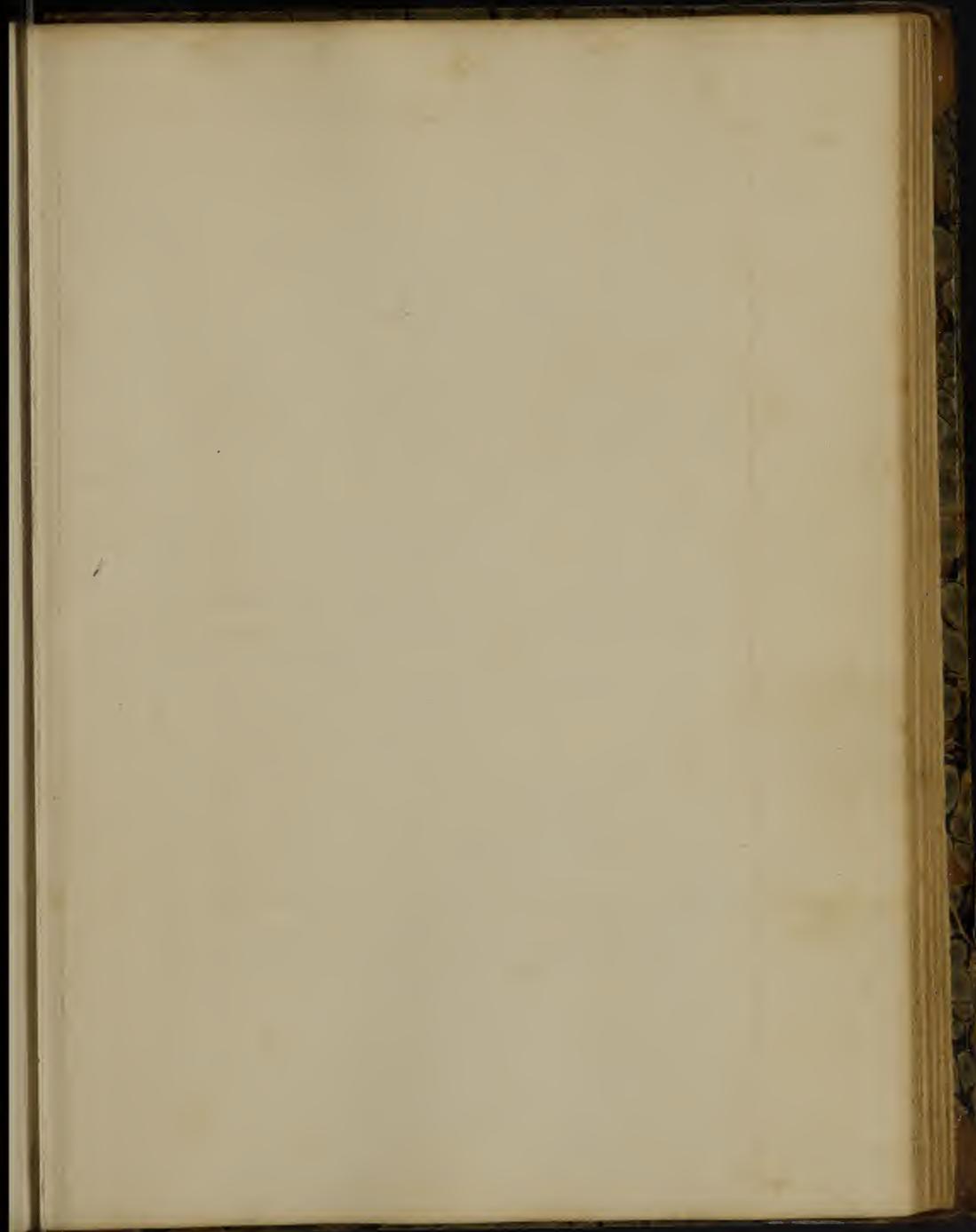
(See also 235. October 264.)

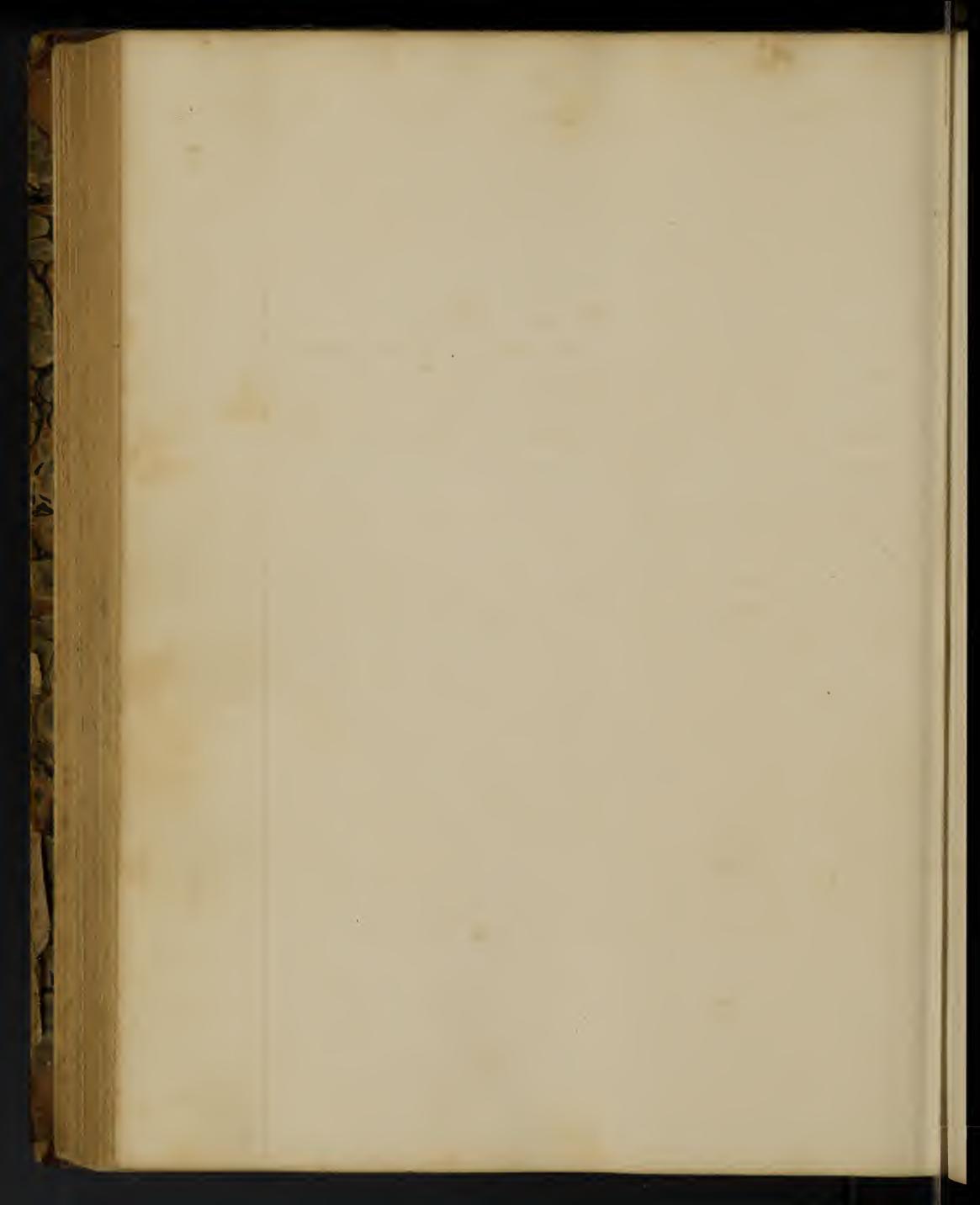
Affidavit, Contra

Pr 6657. Any equitable interest remaining in the
373. grantor will pass upon a voluntary conveyance
& will be vailed between the parties. An
equitable interest remaining in the grantor
after a fraudulent conveyance may be
derived as the equity of redemption &
the devisee of the Eq. of Redemption may
redeem from the fraudulent mortgagee









It is difficult to frame any precise definition of the powers of chy. It has been said by Ed Haines that 1st Atlf. 5. it abates the rigor of the law. 2^d that it decides according to the spirit & not according to the letter of the law. 3^{rdly} that it has peculiar jurisdiction over frauds, accidents & trusts. 4^{thly} that it is not bound by precedent or established rules but acts secundum equum et bonum,

In these particular SdC is clearly wrong. In not one of them is he altogether correct.

As to the first neither a C^t of law or of equity can abate the rigour of the law. many general rules are manifestly unjust in their application to particular cases but in law & in Equity the gen'l rule must be adopted. 2 Bl 378. 3 Bl 430 2 Atk 229.

III. It is said that a C^t of equity determines acc- 3 Bl 430. 1. ordering to the spirit &c. But this rule of construction 434: 38 is common to both C^{ts} - and in construing contracts 1 Bl 61. the rules are in gen'l the same as in a C^t of law DONG 264. with the exception of penalties. "N^o law 24"

(4) Power of chancery -

III. As to fraud accidents & trust, Frauds of
3 Bl 437 almost every kind are cognizable at law. Some frauds
3 Hm 207.558 only there as fraud in obtaining a devise of land
3 Atk 177.544 sometimes indeed a b^c of equity will set aside
3 Bl 438 a contract for fraud where a b^c of law cannot
3 Hm 207.544 if fraud in the consideration but for such a
fraud there is a remedy at law. In an action
on the case ag^t the fraudulent party for damages

3 Bl 431. Many accidents may be relieved ag^t in law as
5 Co 74.5. will as in equity. If loss of deeds &c. formerly this
mistake accident c^t not be relieved ag^t at
law.

3 Bl 430. Other many accidents cannot be relieved ag^t even
in equity & as a devise it executed &c.

3 Bl 151. Many mistakes may be relieved ag^t in law &c.
5 Co 74.5. b^c of law can investigate mistakes in an acct. be
even where a balance has been struck & signed
by the parties -

3 Bl 432. Mistakes are fully cognizable in equity but
439. thus trusts wh^t create an interest merely equitable
2 Bl 207.522 are cognizable only in equity. But some trusts
2 Hm 267. are cognizable in a b^c of law as deposits &
Eg: ca 384. all manner of bailments. So again in a pump
3 Atk 312. for money rec^t to another's use.

4 Day 6. In this state there are a few instances in wh^t
an action on the case lies for the violation
of an equitable right - & ap^rog^re of a
chose in action,

There is however one species of mistake which
can be relieved at only in Engt viz a mistake 2 Atk 34.203
in the terms of a written instrument with 3 Do 889
fraud 1 Powl. cou 433. 1 Vesey 315. 2 Vesey 376.7. 1 Bro Chy 341. 1 Root 94.
2 Root 1. 78. 415. 499. — 105.

For this relief must be had in Chy or not at all. for
the established rules of a C of law do not allow
in such a case any relief. Thus a bond intended
for £100. is by mistake of the scrivener drawn for
£1000. & is executed by the parties without discovering
the mistake on a bill filed for this purpose the
C of Engt will compel the obligor to execute a note
for £100 & the obligee to accept such a note. But
this mistake will be rectified only on a bill
not for the express purpose, of correcting it.
The proceedings at law are not adapted to
correct a mistake - a Ct of law must declare
the contract void in toto or wholly good,
¶ It is said that a C of Engt is not governed
by precedents. This is not true - all any rules ^{of Ct of Engt} manifestly unjust are followed in this C because
the precedents are too strong to allow them to
be altered. for Examples, vide 3 Bl 432. Powl. Plat 312.
2 P. M. 640. 1 Atk 604.

(4) Powers of Chancery,

The difference between the law & equity
chiefly consists in different modes of administering
justice in each, i.e. in the mode of proof the
mode of trial & the mode of relief

No mode of proof. The law of equity proceed in
a peculiar way to obtain evidence. Thus equity
compels a party to make discovery upon oath
where facts or then leading circumstances rest
only in the knowledge of the party. Thus in
case of accounts where common law evidence
cannot easily be obtained.

By this means the law & equity have acquired
concurrent jurisdiction over accounts

And as incident to accounts they take cognizance of the administration of personal effects
and of debts legacies distribution & almost
all cases of partnership bailees & receivers &c.
In most of these cases the law has concurrent jurisdiction
& from this source viz the compulsory discovery
upon oath the law has acquired jurisdiction
over almost all matters of fraud & over many
subjects originally cognizable only at law.

But a person cannot maintain a bill in Equity
if he might obtain adequate relief at law
If therefore a bill on an asset is brought, a
discovery on oath must be demanded or the bill
will be dismissed. the mere necessity of discovery
on oath gives Equity jurisdiction

III mode of trial. In the English Ch^y practice trials are conducted by written depositions wh^{ch} 3 Bl 382:3 are introduced as evidence. In Court indeed 438. witnesses in Ch^y are frequently examined viva voce

When a person is about to leave the Country or are already abroad or is aged & infirm depositions may be taken *de bono* esp to perpetuate their testimony & on a bill filed for that purpose the C^c will issue a commission to take their depositions. and they may be done litis pendente vel non by *de bono* & it is meant provisional depositions.

In law depositions taken in this way are not admitted if objected to. a C^c of equity will however compel a party not to object to them in a trial at law.

When a trial is actually pending before a C^c of law that C^c may issue a commission to take depositions in another state &c

(6) Powers of Chancery,

In this way again a C^c of equity sometimes acquires jurisdiction over the main subject) 3 Bl. 438. merely in virtue of its power to take such depositions where otherwise it has no such ~~Chancery~~ jurisdiction.

3 Bl. 436:8. III. Mode of relief. A C^c of equity enforces the specific performance of duties whereas a C^c of law can only give pecuniary damage for the breach of duty. The principle of all is this that a C^c of Equity considers as done what ought to be & to have been done. i.e. that C^c considers the right to the specific subject contracted for as transferred by the express agreement. And where as in cases of varying contracts the remedy at law is inadequate the C^c of Eq acquires concurrent jurisdiction. Thus waste is prevented by injunction for the remedy for waste at law is inadequate. Thus again over questions that may be tried at law by great multiplicity of suits. as in the settlement of boundaries

these three diversities draw within the jurisdiction of that C^c many cases not originally within its jurisdiction.

A C^t of equity will set aside a deed for fraud in the consideration but at law the deed must stand for the obligee is in gen'l entitled to something & a C^t of Equity can give the obligee what he deserves but a C^t of law must compel the performance of the deed or consider it void in toto. It therefore compels the performance & leaves the obligor to his remedy in damages in an action ~~of~~ ^{against} the obligee. But in equity all this is done in one suit with greater perfection.

There are other cases in wh^{ch} a C^t of law differ from a C^t of Equity, there are cases in wh^{ch} the two courts enforce ~~the~~ ^{different} rules of justice particularly in cases of penalties. In a C^t of law if a deed is executed with a penalty & the condition is broken the penalty is considered as a debt wh^{ch} may be recovered in law.

A C^t of Equity considers the condition as the real agreement between the parties and consider the penalty in terrorem to compel the performance of the condition.

(8) Powers of Chancery

The case is the same in the case of mortgage,
the C^t of Equity view the mortgage in the ~~same~~
light as a penalty. a C^t of Equity considers a
penalty as a gt consequence —

Relief ag^t penalty then forms an important
ground of jurisdiction in a C^t of Equity.

10 P.M. 545 In the case of trusts, C^t of law & Equity proceed
58. q. upon diff^t rules of justice. in law trustee may
3 Bl 439. hold the land for ever. in equity the trustee may
be compelled to convey to the beneficiary trust.

Besides the grounds of jurisdiction spoken of by Bl.
It^t a C^t of Equity may enforce justice where
positive law is silent this a C^t of com: law
cannot do.

107/3.1. 2nd a C^t of Equity may abate the rigour &
103. supply the defects^t of a rule of law where the
107. rigour or defect is a collateral or un-foreseen
consequence of the rule.

Example of the fact a Ct of Chancery may stay waste by injunction - the common law has made no provision wh^t requires the injunction & yet as the justice of the case requires it the Ct will interpose a remedy. — So a Ct of Equity will enjoin ag^t a marriage of a child or ward — positive law in both these cases is silent,

Example of 2d of Ct of Equity enforces marriage settlement ^{and property settlements against the rule of the common law} is that agreements made between husband & wife before marriage are made paid by the intermarriage get a Ct of equity considering that this was a case not contemplated by the rule of law. The rule could not have intended to vacate such contract when made in contemplation of marriage & of wh^t marriage was the consider.

Where any hardship or injustice is a necessary direct & obvious consequence of a rule of law a Ct of Equity cannot abate its rigour or supply a supposed defect.

(10) Powers of Chancery - Specific performance

The power to decree the specific performance of
an agreement is the most important power of a
Court of chancery. This power is exercised
because the remedy at law is not adequate.
Catch 172.

This power has been exercised in Chancery ~~succinctly~~ 4th
but not frequently exercised until 1822.

In what cases will a C^c of Equity enforce the
specific performance of agreements? It is said that
1726-33. Equitable jurisdiction in case of contracts
1826-49. extends to all cases in wh^{ch} the subject or the
1826-49 parties are within the process of the C^c. In this
1826-49 C^c acts both in rem & in personam.

But this does not mean that Equity will enforce
every contract where the parties or the subject are
within the process of the C^c. This rule is a
description of the circumstances in wh^{ch} a contract
284-5 may be enforced in equity & not a description
1826-49 of the species of the contract wh^{ch} that C^c will
284-5 enforce. That is this rule is true where the
C^c have jurisdiction over the contract.

or See has been maintained in Engl^d to compel the
compliance of law in Penn. the decree in this case
acts in personam. It can't act in rem. Thus
in the case of Penn & Baltimore. in such a case
a C^c of law cⁿ not give judgment in ejectment in
such a case nor give notice in trespass quare clausum
fret^t. nor indeed give any remedy.

And if a covenants to convey land lying in Engl.
a being in a foreign country. after notice to te
tho' it does not appear the C^t on a bill will
make a decree in rem which per se will vest the
title in the Plf.

Thus also in case of a mortgage of land in Eng^l
where mortgagor resides in this country the
mortgage may foreclose by a bill brought either
here or in Eng^l. in one case the decree is in rem
in the other in personam.
and mortgagor in such case may file a bill
to redeem either here or in Eng^l.

Anciently a C^t of Equity could decree only in 1 Inst 631.
personam but now it can decree in rem in 2 Inst 68. q.
the latter case the decree is a process to put 3 Inst 575.
the Plf in possession & a writ of assistance directed 587.
to the Sheriff & if the Dft refuses to deliver pos: 1 Inst 543.
the Sheriff acts as under a writ of habere facias: 1 Vesey 454.

Decree in rem commenced Jan^y 1.

1 Vesey 452/1
1 Inst 631

(12) Powers of Chancery - Specific performance

When the debtor is in ~~recessum~~ it is enforced
by process of contempt & sequestration of his goods
17 Geo 1st 1654 was held in sequestration until the Debtor complies
17 Feb 1631. with the decree. & he is finally liable to imprisonment
^{& fine} but this can be done only when the
Debt is in the country where the C. has jurisdiction.

15 & 16 17 Marriage settlement agreements, are another
class of agreements specifically enforced
16 & 17. These agreements are void at law on the intermarriage
by Car. 1. the C. of Equity proceed now on the ground that
16 & 17. the rule of the common law did not contemplate
such a case. vide ante
" 26 & 27 " 17

18 & 19. are agreement in form of a bond for the making
17 & 18. of a settlement. a C. of Equity will enforce the
18 & 19. condition of the bond. for that C. treats the
18 & 19. condition as a covenant. tho' it is in the form
of a defeasance.

The C. of Equity in this case looks at the sign of
the bond.

Specific performance, Marriage settlement agreements

If a settlement is made by the husband during
coverture a Ct of Equity will protect & enforce 2 Inst 215
that settlement as at law it would be attacked 1 Ves 444
void. Such a Ct considers such a settlement
as an agreement to convey for of conveyances effected
as such are not within the jurisdiction of
the court for such conveyances purport to carry
the legal title but in this case the conveyance
does not carry the legal title.

Ltt 5168.

Formerly when agreements were made between husband & wife during coverture they could not be enforced even in Equity unless there was an intervention of trustees but now a recent 3d Inst 72 made during coverture with the interposition of trustees are enforced in Equity. The agreements must indeed be fair bond fide as indeed it must be in all cases to induce a Ct of Equity to enforce a specific ex^r.
Ltt 3

1 Inst 945.

2 Inst 385.

3d Inst 72.

Inst 270.

Inst 95.

1 Inst 245.

2 Inst 308.

1 Inst 685.

And by the law of Equity the wife may dispose of property thus given, to her sole & separate use as a feme sole may
2 Ves 1. 91
665.

(14) Powers of Chancery. Specific performance

There was a decision in this state in 1804
1 Day 221. in wh^t the C^c held that an agreement between
hus. & wife was not binding. at least it
appears so from the report. but it has since
been decided that the English law is our
law. & the decision in 1 Day was founded on
the particular circumstance of the case —

What sorts of agreements will a C^c of Equity specifically
enforce?

1. 7攀bl 139 Chancery will decree the specific performance of agreements
2. Pow^{ll} 6 1456 falling within its jurisdiction & requiring equitable
interference in those cases & generally in those cases
only in wh^t a C^c of law will give damages for
non performance. if then a case is one wh^t will
not support a recovery of damages at law the C^c
of Equity will not interpose. but if the
case is such as that damage might have been
recovered at law the C^c of E will interfere provided
the damages are an inadequate remedy. &c.

Hence it is that a C of Equity will not in genl
enforce a voluntary agreemt. not even a voluntary 1 Parl 841.2
agreemt under seal. 1 Atk 10.

1 Stra 738.

1 Ves 74. 450.

But at law if the agreemt. imports a consideration
the Dft cannot deny the consideration but in Equity
the Dft ^{in some cases} may show that there was no consideration
even by parole. for this evidence merely instructs
the conscience of the chancellor whether he ought
to decree a specific performance. or whether he
ought to leave the Plf to his remedy at law.

But there are exceptions to the genl rule on
last page - on both sides. To

one excep^t is the rule that ~~20. 2. 1.~~ ~~leave~~ a specific performance where damages might
be recovered at law for non performance.

The Equity will never decree a specific 1 Parl 857
performance where it w^t plainly be unconscionable 1 P.M. 429
to decree it even tho' damage ^{279. 282} might be recd. at law.

thus a bill brought for the conveyance of land
at a subsequent low^t fide purchaser ^{formal} the notice
of the executory agreemt will be dismissed
still in this case damage may be recd. at law
from the vendor.

But if the subseq^t purchaser had notice Equity
w^t decree a conveyance from the purchaser to
the purchaser under the covenant.

& if the subseq^t purchaser was worth value —

(16) Powers of Chancery. Specific performance

But in agreement to convey real estate on
17 May 1828. valuable consideration & where every thing is
fair will be enforced ag^t an intervening
judgment creditor, for the decree is only a general
one.

So again when a bill is brought to accept
17 Feb 178. a conveyance & pay the consideration equity
2 Aug 1801 will not compel an acceptance if the defendant's
2 July 1814 title is under encumbrance wh^{ch} cannot be
easily removed still in this case damages
2 Oct 1814 may be recovered at law.

1 Nov 1816. So also if one person covenants to sell lands
belonging to another expecting that he can
purchase the land. if the land cannot be
purchased a C^t of Equity will not compel the
specific performance of the covenant. the damages
may however be recover^d at law.

Powers of Chancery (No 2) Specific performance

That in all cases in which Equity will decree the specific performance of agreements or in all no damages could be recovered at law.

This is the case in all marriage settlements agreed 2 Pw^c 616.
made ante) which are rescinded at law but in 25 H. 5. 7.
specific performance of them will be decreed in 2 Pw^m 243.
Equity. 3 Atk 607
1 Fa 68. 9

And the rule is the same in settlements made by husband during coverture with the intervention of trustees.

So again if one lends money to an infant who the latter expends in necessaries in Equity the infant will be compelled to pay the value of the necessaries 17 Mb 88.
to the lender tho' at law damages could not be collected 368.
recovered. 2 Px 625 & 7

On the ground that it is altogether equitable 17 Pw^m 578
& that it appears a jurisdiction of infancy 48. 3 558.

(18) Powers of Chancery. Specific performance

when the obligee in an assigned bond
after notice of the assignment takes a release
from the obligee a C of chancery will compel
the obligor to pay to the assignee, tha' at
law the assignee cannot recover. here the principle
is, that he chooses in action ac. not at law
assignable yet in equity the beneficial interest
is assignable & that C will protect the beneficial
interest

for authorities see vols of exchange.

In comt' an action on the case will
lie ag. the obligor,

2 Nov 1844.

Where an agreement is made by the act of the
Co. itself that Co. will enforce the agree't the
no action at law w^t lie on it. thus a
judicial sale of land &c. In this case a C of law
will not interfere because it is the act of another Co.
& Equity therefore must support the agreement.

When the condition of a bond is destroyed at law by the union of the right + obligation 10 mod 575.
in the same person the he will enforce the 1 yellow 62
bond or the condition of it in favour of Bretton 28th Oct 1824
~~the~~. Thus it becomes Ex parte of the obligee
in a bond of wh^{ch} the O^r is obligor. tho'
at law the bond is extinguished yet at law
in Equity the bond is good in favour of O^r
The same rule holds of other contracts besides bonds.

But in Conn. the bond in this case is not
extinguished in Equity in any case even
tho' there are no O^rs. Bacon & Shepard Supreme C^t
of Conn^t Litchfield June term 1826.-

If the recovery of damages at law can be had 1 Fon 628
& is an adequate remedy Equity will not in genl 139.
decree a specific performance. for there is no 2 Fon 62344.
need of Equitable jurisdiction. This rule admits
of no exception unlesp where modern rules of
law give an adequate remedy & where the
ancient rules of law did not afford an adequate
remedy. For the introduction of new rules of law
shall not oust the ancient jurisdiction of that Court.

Powers of Chancery. Specific performance.

(20)

What are those contracts in which the remedy at law is inadequate? This depends in a great measure on the subject matter of the contract as being real or personal. & so far as equitable interposition depends upon the subject matter of the contract the general rule is, that a C^t of Eq^y will enforce the specific performance of no other contracts than such as relate to real property & such contracts the C^t will generally carry into specific performance. This is general but not universal. The reason is that where the contract is concerning real property a recovery in damages is not in gen'l deemed an adequate remedy.

There are cases in which justice requires a specific performance of contracts relating to personal property & in such cases a C^t of Eq^y will enforce the specific performance of the contract. But in gen'l the remedy at law on personal contracts is deemed adequate.

If the Plaintiff sues with the damages &c of equity will decree the specific performance of a contract relating to personally the Plaintiff's if it brings an action at law ag^t D^r on a personal contract 2 Poul 6216
contract & D brings a bill in equity charging D with fraud. of 169. ca 17
may bring his complaint in Equity denying the fraud praying 18 Bac 69. 526
that the C^r will decree the specific performance & if the fraud
is not proved or is disproved. the C^r will decree the performance
for as the Plf at law is drawn into equity on a groundless
charge of fraud the C^r of Chancery thinks it is reasonable
that the Plf at law shd have his remedy where he is thus
reluctantly brought. But in this case the Chancellor
cannot assess the damages but must direct
an ipso quantum damnicatus at law to be
tried by a jury — But in Conn^t the Chancellor
appoints commissioners to determine the damage.

S. if Plf files his bill in chancery on a personal contract 2 Poul 6215.
& the Deft does not demur. he tacitly submits the Bill Eg 822
case to the C^r. & that C^r will decree. the Deft in this
case is supposed to answer without demurring the C^r
proper way of objecting to the jurisdiction of the C^r
by demurring.

Powers of Chancery, Specific execution,

(22) If an agreement respects an interest in lands or stipulates the performance of some specific act on a bill filed a

1 Fob 6278. C of chancery will decree the specific performance.

189. 359.

2 Poul 6219.

1 PPrms 282.

2 Poul 6219 If an agreement concerns the personality on one side & realty on the other the C will decree a specific performance on a bill filed by either party. This is almost always the case - the agreement is seldom concerning the realty on both sides.

Thus if A covenants to convey for a consideration to be paid by B A may file his bill & compel B to accept a conveyance & to pay the consid^w. For it is a gen'l rule that the interference of Equity must be mutual.

1 PPrms 450. A gen'l covenant to convey lands of a certain value with any particular description of such lands will not be decreed in Equity to be specifically performed. For here the principle that the C considers the title as transferred from the time of the exec^t agreement does not apply.

Besides here is no room for specific performance - what land shall the A. order to be conveyed,

Gentlly he who prays for the specific performance
of an agreement must show in his bill either that
he has performed or is ready to perform his part 17m 6388
for if he will not or tho' his own fault cannot 1 Ves 87,
perform his part he cannot have a decree - 2 Poul 619.
Dart 112.
2 Freem 35,

But the rule is diff^t in law.

This rule results from the discretionary interpretation
of the Chancellor

It is therefore a general rule that when a P^t 17m 6385
has performed in part but is prevented by 2 Poul 619-
something subseq^t from performing the rest the
P^t is not entitled to a decree. for x

Thus A agreed to pay \$1000 to B within two yrs Gilby 218.
provided B should marry C's daughter & settle a 20m 619.
a certain jointure on her within two yrs. B married him 287
but his wife died before the jointure was settled
B brot his bill for \$1000. but the bill was dismissed

Powers of Chancery Specific performance,

(24)

But where the Pef having performed in part
+ being in no default for not performing the
rest he is not left in status quo. here equity
will decree tho' the Pef has not performed
the rest. Thus where on an agr'eemt between
Prc in chs 12 the owner & freighter that freight shd. be
charged only for the homeward cargo + the
freighter had no cargo to bring home
& the ship came home without any cargo.
The owners were entitled to & received
a compensation. -

Abt 88. And where the Pef has been willing to perform
1800 R 1312. or his part but has been prevented by the Dft
407 R 761. the Pef is entitled to a decree. Readiness
Lulk 11. in this case is equivalent to actual performance
Here the rule is the same at law as in Equity.

1 Nov 240. But a b^c of Equity will not decree a written agr'eemt
2 Atk 65. under seal whch has been discharged even by parol.
220. + parol proof is admitted for the purpose of rebating
3. 7 Mys 160. an Equity. -

1 Br. bk 201.

325.

2 Ves 899. Now at law this parol discharge w^t have no
Tall 79. effect whatever + in Chancery it is admitted not
240. to affect the contract but to instruct the
conscience of Chancery whether it wd be equitable
to carry into specific performance such a contract
+ it leaves the parties to their remedy at law.

Again where a party has permitted a claim
to lie a long time dormant his delay will
prevent a decree in his favour unless he can show 2 Wm 276.
some good reason for the delay. such a delay is prima facie 484.
facie a waiver of the claim.

2 Parl C 260.
1 Fob 821.
2 Ack 610.
2 D. Wms 82.
1 Fob 834.

Hence where there was a marriage agreement on the
part of the husband to settle lands within three
yrs & the claim was not insisted on until several
yrs after the three yrs were expired. on a bill for
performance the husband insisted on the length of
time but the decree was made agt the husband it
being shown that the claim was delayed because the
husband was in business wh^{ch} required all his capitals

But no length of time will prevent a person
from taking advantage of a fraud. or from 2 Fob 6.
insisting on the exⁿ of a trust.
The off^r omission to perform his part precisely at 10th 12.
the time fixed if he is ready within a season - 4. B. Ch 324.
able time after the time fixed is no objection 1 Fob 834.

But in a late case at law it is said that this 1 East 627
rule of Equity is altered -

(26) Power of Chancery Specific performance

Again where a party seeking specific performance
has himself trifled with the contract or shown an
intention not to perform his part he cannot in general
have a decree. This is as it were a parol discharge,

An 626.7 It is said that there is an exception to the
gen'l rule that the Pp cannot have a decree for
specific performance unless he has performed his
part or shown a readying so to do in favour
of the ipse under a marriage settlement agree-
m'tn they are purchasers under the settlement &
it is not their fault that one part of the agree-
m'tn is not performed & cannot be performed. as to any
duty to be performed they are third persons. And
any non performance is a fraud upon them.

Nos 377.8 And the same principle holds with respect to
2 Inst 628. a settlement made on the wife provided the
wife is no party to the agreement.

There are many cases in which a C of Chancery will decree a performance as far as possible where complete performance is impossible.

1For 6209. 11

2 Pow 31.

3 Br Pl 339.

6 Litt 352.

219 b.

2 Bl R 721.

And this is the rule at law but not so much so as in Equity. 2 3 R 254. 2 26 Bl 163. 581.

As where complete performance is rendered impossible by the law as by a subseq^t statute,

Or by accident or by act of God. In each of these cases if the party wishes he may compel a performance *in pais*.

1 Do 4448.

1 Eg ca 18

3 Bl R 339.

Powell 384.

Again where one has a power to lease for 10 yrs and leases for 20 yrs now a C of Equity will support the lease for 10 yrs. the C will consider the lease *in 15* for 20 yrs as an agreement to make a lease for 10 yrs and will therefore compel the lessor to make a lease for 10 yrs.

Now such a lease at law w^t be utterly void. 2 M 252.

It is a rule of law that when one conveys to a life remainder to the heirs of his body a takes an estate tail. In executed agreements the rule is the same in Equity.

16099

1 For 6399.

8 T R 516.

Fearne 25-

Powers of Chancery Specific performance

(28) But in articles of covenant - to settle land
on it for life remainder to the heir of his body
2 Pow. 641 & C of County construe the words differently, and
15. ca 892 will decree a conveyance to A for life only
Chancery 658. remainder in strict settlement. The Ct of Equity
2 P.M. 349 here construe the agreement according to the
1 Nov 238. words & apparent intention of the parties,
1 Feb 399
1 D.P.W. 622

The C^c hold that they may in conveyances ex quo
32th 293 give these words a diff^t construction because this
16176. construction is more according to the genl intent
2 P.M. 356 of the parties than the construction at law.
2 Parl. 6242. And the C^c has even gone so far that after
a settlement has been actually made after marriage
on an agreem^t made before marriage, "to a for life
remainder to the heir of his body" as to set aside
the settlement & make another for its own uses -
ie to make a new settlement to A for life
remainder in strict settlement - For this
settlement is void at law,

2 P.M. 123 And when there were such articles & the settlement
2 Nov 658. made before marriage & expressed to be in pursuance
2 P.M. 349. of the articles the C^c held that it was not in
2 Parl. 426. pursuance of the articles & set it aside & made
1 Nov 238. a conveyance after its own uses. But unless it
2 P.M. 356. was expressed to be in pursuance to the ct
c^c not set it aside,

There before remarked that a C. of equity considers
an executory agreement as executed from the time when
it ought to have been executed which is the time of 1 Fox 349. 59
making the agreement. (unless some other time is fixed 413
according to some opinions) but the better opinion 2 Vesey 639
is that the contract shall always be considered as 1 P.M. 710.
executed from the time of making it. As Equity 61.
regards the future transfer of the legal title Rob. on F.C. 665.
at a time fixed as a use formality - post 667.
2 Pa. 656.
2 Atk 400
2 P.M. 420.
Hollister 290.
2 Br. L. 118.
1 Maddock 290.

This rule means merely this that that C. considers
the right as vested in the purchaser from the time of
contract made & considers the vendor as trustee for the
 vendee from the time of the contract made.

It follows that if money is articles or devised to
be laid out in land Equity considers the money as
land from the time of the contract made & will
carry the money to the heir as land.

2 Verm 546.
1 Fox 413.
2 Pou 683.
1 P.M. 532.
483.
2 P.M. 171.
3 P.M. 21.
Poc. in ch. 5713.
1 Vesey 175-96
Rob. F.C. 665-7.

Powers of Chancery. Money articles

(30)

2 Vern 536.
585.

1 Fowb 414.

Hence money thus articles is subject to courtesy in the hands of the person who would have been entitled to courtesy in the land if the purchase had been actually made and his right may be effected in either of two ways viz. a C of Equity will compel the money to be laid out in land & settled on the husband for life remainder according to the articles. or the husband may receive the interest of the money during his life.

But in similar circumstances the wife is not entitled to dower. but in Comt & N.Y. she is entitled to dower. For the wife is not in Eng. entitled to dower from an equitable estate, -

Recd in 6320 On the same principle where there has been such
2 Don. 6109. a devise or article of money. it will generally pass
2 Vern 679. under a genl devise of real estate & in genl will
1 D.M. 172. not pass to a genl legatee. under the form all
3 Atk 254. my money &c
3 P.M. 221.

2 Don. 6112. These rules obtain whether the fund to be paid for
2 Parl 686:7 land is distinguished from other, but the agreement will bind all money & indeed all the personal property of the covenanter

But if. does not consider money as law unless
the agreement to vest it in land is positive. If
therefore one agrees that a certain sum of money 1 Fonl 444
shall remain in trustees hand until a convenient 2 Verm 227
purchase can be had. here the agreement is not suff^{ft}y 3 Atk 255.
positive. If money is intended to be invested 2 Pon 84
in lands or securities the election must be made 1 Verm 298
otherwise the money will be money. & he who is
to make the election can have nothing under the
contract

And land may be considered as money thus if the 2 Ves 639.
owner of land covenants to sell certain lands & 640.
does without making a conveyance. the land will fall 15th.
become money & the land will belong to the Execte 1 Fonl 414.
in Equity, And the former rules hold 2 Pon 83.
& converso in these cases.

Another effect of this principle is that the 2 Verm 280.
property agreed to be conveyed is considered as conveyed 206 61-5
from the time of the agreement, made is at the 2 P.M. 2411.
risque of the vendee provided the vendor is 1 P.M. 61.2 ~~and~~
gullible of no fraud or misconception. 1 Br. 6th 156.
2 P.M. 27

contra but not contra —

Par^d Dev 660

1 Ves 487

2 M. 65-12

16. 6

2 P.M. 22

1 P.M. 22

This rule holds over the a future day is named for
the execution of the conveyance —

2 Atk 400-1 Gladday 270. 2 P.M. 22 1 P.M. 22

(32) Thus it owned a lease for 3 lives & B agreed to
1 P.M. 61. purchase but before the time of conveyance came
2 Nov. 65. one of the lives drops the vendor was held to bear
the loss & was obliged to pay the whole purchase
money. There a subsequent day was fixed for
carrying into effect the agreement & before that day the life
2 P.M. 27 drops (Other examples.)
2 Nov. 65. 6.

But where the agreement is not for a sale but merely
2 Nov. 67. for the right of preemption, this doctrine does not
apply. for this is merely an agreement that another
shall have a right of preemption. It is an agreement
between A & B that they will hereafter come to
some agreement concerning the property. None
even in Equity the title does not pass.

Sources of Chancery (No. 3.)

But the money articled, to be laid out in land
is prima facie land yet if the party ~~who~~ w^t be
tenant in fee simple of the land when purchased 1 Fob 6 H. 13.
the money will be money or land at the election 2 Verm 295.
of the person entitled to the fee simple. for the Rob 76. 66 (A)
right of no third person can be effected by permitting 2 Pow 112.
the money to be considered as money or as land.
for if the land was decreed to be purchased the
person entitled to the fee might immediately
sell it & therefore the decree w^t be nugatory.

But if the agreement were thus that a sh^t purchase
land worth £1000 & settle it on B & the heirs of
his body or to B for life remainder to C. & a
third heir of B's body might claim that the money
must be laid out in land. But in such a case is 2 P. M. 175
where the money is to be laid out in land to be 3 P. M. 221 (A)
settled on A in fee simple, if A does not make his election 3 Ath 526.
to have the money as money it will be considered 25 Th. W.
as land. for instance if A dies without making an 18 Br. Ch. 223.
election A's heir at law may claim the money 238.
as land. and the heir at law may retain the
money as land or he may obtain a decree that
the money shall be laid out in land. but if
it should be made a will giving this land money
to C and describing this money as money wh^t was
articled to be laid out in land to C will have
the money & the money will pass by a will not
executed according to the start of probate.

And in this case parole proof is admissible to show
that A did in his life time elect to treat the money
thus articled as money. This is only rebutting resistancy.

Powers of Chancery. Specific performance

(34) This election may be shown by acts of the testator in his will or by words. Thus it may be shown
2 Dec 6115 by the personal representative that the testator said
17 Mar 483 that the land shd. not be purchased.
2 Feb 174.
2 Dec 6117.

Want of Eq: on the side of the Pif is a decisive
objection to a decree in his favour where he prays
2 Nov 6115 specific performance of an executory contract.
1 Eq 220 Hence want of mutuality in an agreement is a decisive
2 Nov 233 Objection to a decree for specific performance.
This at law damages in such case might be recovered.

Want of certainty is a sufft objection to
a decree for the specific performance 1 Eq 220.
2 Inst 233: 4 2 Vern 415. Ex: A agreed to sell to
B: a manor for £1500 less than any other
purchaser would give - Here the objection was
twofold viz uncertainty & want of mutuality

How far a voluntary agreement will be specifically decreed vide 1 Madd 326:7.

But if the agreement is originally mutual no
superercent want of mutuality will prevent a
decree for specific performance. Thus A agreed 28r P.C. 415
to pay £ 920 per cent for certain stock but afterwards 2 Pa. 232-4.
the stock fell to par. Here it was held that A 14th 10.
shd pay the purchase money for the stock at 10r & £ 15s.
the time of the purchase was worth 920 percent.

C. & C. agreed to convey a manor in consider-
ation of an annuity on him for life & C. & C. died
before the first instalment - yet the heir was
held to convey the manor.

Relief agt penalties.

Generally a C. of chancery will neither enforce a 1 Vern 60
penalty or permit one to be enforced & if one 2 Don 6204
files a bill on a contract contract which contains 207.
a penalty he must expressly waive the penalty or the 10 Madd 31.2
bill is demurrable & will be dismissed. 43.

A Ct of Equity considers a penalty
as unconscionable - But Cleckd dock says
that relief agt. penalties is founded on the
its power to relieve agt. accidents,

Equity will will not suffer advantage to be 2. Pow 6204
taken of a forfeiture or a penalty where the substance 1 Br. 62341
of the contract can be obtained without the penalty. 1 Pow 171
Thus on a bond the obligor may file his bill 2 Vern 316
for relief agt the penalty on paying the condition 209
& interest & costs & will make an injunction 3 Ruth 520
agt the obligee from suing on the bond at law 2 El 341

Powers of chancery. Relief ag^t penalties,

(36)

It follows then that where a compensation can be made to a party claiming a penalty by a clear rule of damages, Equity will generally relieve ag^t the penalty. Thus in a bond & 2 Pw 6205 in a mortgage deed. So also if one gives q. Mod 112.3 a bond or covenant with a penalty for an am^t capable of being ascertained by any known standard the Eq will relieve ag^t the penalty. Thus a bond with a penalty for the delivery of such a quantity of goods the penalty will be relieved ag^t for the value of the goods can be ascertained.

(37)

But where the case is such as to furnish no rule of damages, there Eq will not relieve ag^t the penalty. thus if leases covenants under a penalty of forfeiture to not to abign.

If there is a rule of damages yet if by
reason of intervening events no compensation
can be made, as a complete substitute for the
penalty a & of Cl will not relieve agt a
penalty. Thus it is agreed that unless he makes
a certain jointure on the wife within two years
he will forfeit the wife's portion. the wife dies
before jointure made It was held that the
husband must forfeit the portion for the wife being
~~dead no compensation c^o be made for the jointure c^o~~
not be made.

Vern 68:9
1 Feb 68:7
2 Pm C 205.
207.

Again where one party voluntary stipulates a
favour to the other party with condition that
unless the other party does such & such things
the favour shall be forfeited if these things
are not done the favour is forfeited

Vern 220
Barnatt 8
Princibl 160
Vern 406
2 Pm 68:3

For this is not within the principle on which
equity relieves agt penalty. It is not unconscionable. Ex Creditor
agrees to take 75 pr c^o if paid on a day
certain. & the day passes. The debtor must
now pay the whole debt. - The thing lost
is a mere gratuity. & here nothing more is
now to be paid than natural justice requires,
& therefore this is not strictly a penalty

Powers of Chancery). Penalties

(38) Where Equity on one side will relieve agt a
17 Parl 1441. penalty contained in an agreement it will on
the other side enforce performance of the agree-
& the rule holds e converso,

It was formerly held that where there was a
17 Parl 1441. penalty in an agreement the party bound has
2 Parl 136. his election in all cases to pay the penalty
Jacobs or to perform the agreement & this rule is
~~penalty~~ clearly according to the letter of the contract
yet &c of County will now enforce the perform-
ance & not allow the obligor his election for
the object of the contract is clearly to secure
17 Parl 1441. the performance of the condition. This rule
1 Brichy 418. holds wherein the penalty appears to be
1 Parl 171. a mere security for the performance of something
Dong 431. collateral, a Ct of Equity will on the one
hand relieve agt the penalty & on the other
enforce the specific performance of the condⁿ,
for the condition is regarded as evidence of
an agreement to do the act, contained in the
condition.

4 Burnell This relief is generally given by an injunction
2 Parl 1. that the obligee shall not, on receiving pay^t
10 Chas 577. of principal & interest & generally costs prosecute
17 Co 328. for the penalty
2d Atk 371.

But there are cases in which the obligor has his election & may by paying the penalty free himself 3 Atk 395
from all other obligation, such is the case where 4 Bur 228
the penalty appears not to be security for 17 Feb 142
something collateral but is in the nature of ~~and~~ 6 Br 1417
damages and in this case equity will not 470.
relieve ag^t the penalty, nor enforce specific 1 Madd 39
performance, - for the sum specified is not here 2 Atk 194
fixed in terram to compel performance, 2 Br 14346.

It is frequently difficult to determine whether a
penalty is for the security for something collateral
or whether it is in the nature of damages.
Ex A lessee covenants to pay \$50 for every acre of
meadow whch he shall plow now in this case
the lessor may plough & a C^c of Equity will not
interven, nor will they relieve ag^t the penalty.

On the other hand when the penalty is truly
in nature of damages a C^c of Equity
will not enforce specific performance.

1 Feb 142
2 Verm 119.
28 R 32.
4 Bur 228. 7.
1. H. 247
282.

But suppose the contract of the lessee had been
that I hereby covenant that I will not plough
meadow & then adds I bind myself in the
event of sum of \$1000 not to plough &c. now this w^t
would be regarded as a penalty for the performance
of something collateral & in this case a C^c of
equity w^t forbids the lessor to plough & if there
are any true damages the lessor w^t be relieved
ag^t the penalty.

1 Feb 142
2 Verm 228.

(40) Powers of Chancery. Penalties.

(40)

whether a crop sown to be paid or breach
of a condition or non performance of an
agreement is to be considered as actual damage
or as a penalty strictly speaking is to be determined
from the intention of the parties as collected,
from the whole agreement.

Set boni law break of condition articles obligates
to recover the whole penalty.

But from the earliest period one of common law relieved up penalties by reducing down the penalty to the real damages.

14 Dec 13. And by the English Statutes 8 & 9 Wm 3 & 4 & 5 & 6 Ann
1 Dec 5 & 6 H. Where an action is bro't to recover a penalty
or lascap, a debet of law will render recd'l for the damages
actually sustained.

卷之三

341

2 Ch 153. The English Statutes do not extend to all penalties
Laws 25.6. but one st does extend to all penalties with
8.7.11.6. may be relieved as in Co. Essex wide corr. broke

Tho' a C^t of equity relins agt penalty it
frequently ascertains the damages by directing
an issue of quantum damagis at law.

1. 2d 442.
2. 8a 624.

Where the damages can be ascertained by
computation there is no need of this issue
at law.

C^t of Equity cannot relieve agt a forfeiture
incurred by the non performance of a condⁿ precedent,
this cannot properly be called a forfeiture for the estate never vests, in case of a condⁿ precedent,

Setting aside agreements.

Other C^t has the power of doing this by
acting in rem or in personam, Equity will
often refuse to decree the execution of an agree^m 205.8 1528
and it wd not set aside on a bill filed for that purpose. 280.3a 5.
The reason is that the interposition
of Equity is discretionary. Thus the single
fact that a contract is a hard one or the
def^t is decipie agt decreeing its performance
but this alone is not suff ground for
settling it aside.

Powers of Chancery, Setting aside agreements.

(42)

In all cases indeed where the Dft can rebut the Plf's equity that he will refuse to decree the agreement, for the interposition of the C^t is discretionary

2 P.M. 203. But fraud in obtaining an agreeⁿt is a suff^t ground for setting the contract aside.

2 Powl 445. In if the contract is such that a Ct of Law & Equity interfere 530. consider it as void n^t Equity interferes.

If a Devise is obtained by fraud Equity will not set it aside but leave the matter to Madd. by determined at law. But it seems that Equity has concurrent jurisdiction in all frauds except that of ~~of Law~~

2 Ath 324 And tho' unreasonable is not per se a suff^t

2 Ves 627. ground for setting aside a contract yet that 1^o on 116 with other things may furnish evidence of fraud.

2 Ven 42. Thus gross inadequateness of price with other facts may contribute to presumption of fraud

2 P.M. 41. But imposed hardship & oppression constitute a ground of relief in Equity distinct from that of fraud

2 Powl 645. & for that cause alone a C^t may set aside 88. 163. a contract.

2 1 es 182. If in a contract obtains ^{the} fear tho' not extorting 1 Powl 645. to legal def^rd.

3 Do 294 h. that a contract that interest shall become principal at the end of every year. For here it will be presumed that one party was in the power of another & took a that advantage was taken & hardship imposed. Such agreement fully ratified is good.

When an oppressive contract is also unlawful
the will a party relieve agt the agreement out
only in favour of him who is not party 2 Inst 40
ordinaries. Thus in case of Usury, the party Fall 38.
agreeing to pay uncharitable interest is not party
ordinaries. But in equity if a party agrees to
be relieved agt. Usury he will be relieved on
paying principal & interest. but at law on
the plea of Usury proved, the whole contract
is void. The reason of the rule in Equity is that
The bill pray to be received from the wrong part of
the contract, the interposition of the Chancellor is
discretionary. He may therefore impose terms on the
applicant, & the terms here imposed are reasonable
for the applicant justly owes the debt & lawful interest.)

But when the parties to an unlawful contract are both Con 200
deemed guilty Chancery will interpose for neither at least Fall 41.
equity will not interpose beyond the provision of 2 Inst 6150
positive Law. 1 East 98.

Powers of Chancery, Setting aside contracts,

(44) And any unfairness on the part of the off will prevent a decree in his favour. "the off must come
Vern 227. with clean hands"

229.

3 Oct 383.

2 Jan 6221.

226.

1 Arb 440 And with regard to unfairness suppressed veris
Proc in bl 539 equivalent to suggestio falsi. Thus where a bill was
Recd. Feb 524 brought to compel performance of a purchase when
531. the rent was stated truly, but some necessary
repairs were not stated.

2 Parl 225 And in some case where there has been some
196 misconception, tho' no deceit, a C^c of Eq. will
2 Parl 326. refuse to decree a performance. & will in some
cases set aside the agreement

2 Parl 196. And a mistake in fact is in many cases a
Morley 364. ground not only for refusing to decree a
Vis 849. performance but for setting aside an agreement.
Madd 324. But mistake in law will have no effect. one
exception where a title to an inheritance was
in question between an elder & a younger brother
(case of the school-master) it is agreed in
a concord will not be set aside, / a mistake
in law.

But if there is a mistake in a point of fact
whh fact was the moving cause the sine qua non
of the agent the contract will be set aside.
This mistake supposes no fraud on either side.

1 Wash 400

2 Pn. L. 196

If the object of one party is to sell & of the other
to purchase a mill seat if there is no water
power the agreement will be set aside.

The compromise of a doubtful right is a good consid 10 M^r 726.
eration it being fairly made tho' it can afterwards 1 Atk 10.
be shown to the C^t that the entire right was in 1 Pn. L. 142
one party. 2 Pn. L. 200 4

This case supposes something of this kind A owns 2d Atk 587
a piece of land & claims it. It is doubtful to 592
both what w^d be the event of a suit. They therefore
compromise. Now this agreement is good for the
very doubt is a consideration & they knowingly
enter into a bargain of hazard.

Agreements won obtained by coercion tho' 10 M^r 118.
not amounting to legal duress will not only be 2 Pn. L. 160
not decreed but will be set aside. And 18 J. 264
undue influence tho' not amounting to coercion
is a suff^t ground for setting aside an agreement

Causes of Chancery. Setting aside agreement

(46)

But a person cannot set aside a contract
in Equity on the ground that it was obtained
by parental influence unless it can be shown
that such influence was unconscionably exer-
cised. for it is a gen'l rule that fear arising
from due & proper respect to such a relation is
never a suff' ground for setting aside a contract.

3 PM 1304 Intoxication in one of the parties is not
per se a suff' ground for setting aside a
contract but if the intoxication was produced
by the practice of the other party and advantage
taken of it the rule is diff' so if unfair
advantage is taken of one's intoxication the
contract is void not on acc't of the intox?
but for fraud. and tho' the old rule may have been
different the law now is that the contract of one, bereft
by intoxication, of his reason is void at law as well as in
Chancery.

3 PM 124 Imbecility of mind when the party is legally
1 PM 30. compon' mentis is not a suff' ground for
setting aside a contract but such a fact is
sometimes a suspicious fact and accompanied
with indications of fraud & unfairness may be
a reason for setting aside a contract.

Agreements intended as or operating as a fraud on
third persons are illegal & are set aside both
in law & in Equity. Ex A contract made 1Eq.ca 88
between a ship master & a stranger to defeat 2Dow.C.165.
the interest of the owners. — At law 176.185
indeed the contract is not set aside but 1Vern.348
when an action is b't on the contract 412.415.
a Ct of law will give judg^t ag^t the p^tf, 1Ves.375.
Rob.5.538:9
1B4895.2d.2 7R763. 1H&L6567.1H&L322. 4T.R.166.
1Vanc.602

And such contracts cannot be ratified for if 475.
it could be ratified it w^t still be a fraud on 1D.M.4496.
third persons. a party can indeed waive for 3P.May.75
himself a rule of law intended for the benefit 2Dow.C.176.
of himself. but he may not waive such a rule when intended for the benefit of third persons.

These cases frequently occur in marriage settlements.
Thus the husband agrees to return part of the
property settled on him and his wife for the sake of
deceiving the wife or her friends. the agreement to return
the property will be set aside but the property will
be the husband's.

Marriage brokerage bonds are always set aside 1Fob.245.
in Chancery because their tendency is to 1Pou.174.
produce fraud on third persons. 190.
1Banc.474.5.

Powers of Chancery. Setting aside agreements, & Cents,

(48) And contracts with heirs apparent for their expectancies are always set aside in equity, even tho' the heir be of full age & the agreement might be beneficial to the heir if such agreements are contrary to the policy of the law.

167

1 P.M. 310. The rule formerly was to set aside only 2 &c 292 such agreements as were prejudicial to the 2 Vols 125. heir but not so now.

2 P.M. 187

3 P.M. 292. And such agreements have been set aside after 2 Vols 144. they were carried into execution, even where 2 P.M. 183. it was so in obedience to a former decree in Chancery.

2 P.M. 187. But if the original contract is fair & is 184. freely ratified in full information & then 2 Vols 154. after he has come into possession the agreement 1 Vol. 320 will stand.

1 P.M. 320.

1 Vol. 441. But at law a deed of conveyance with covenant of seizin must bind him for he is estopped to deny that he has title when he made the deed. But at law if the cov. 185. is in writing & it appears on the face of the cov. that the vendor was a young heir the court will red.

Powers of Chancery (contd.)

It is a general rule that an agreement to do some thing leading to extortion injustice injury &c a Ct will not decree its specified performance - And 2 Pw 259 probably in many cases would be set aside Yes 23 tho' there is no case which goes so far.

Another extensive head of equitable jurisdiction 3 Bl 324 formerly set off but now by Stat 2 & 4 47 & 123. 5th Geo. II. Set off may be made at law, the Ct 67 & 456. Ct may plead a debt due from the Pif 24 & 644. to himself. This head of equitable jurisdiction 14 & 67 done chiefly in Eng. But the Court C. & P. C. have no such statute. Set offs are therefore upon principle to be decided in Equity if at all and in law to a limited extent.

In this state Equitable jurisdiction is in the County Ct & Supr. Ct. if the matter in dispute has not exceeded \$5. the Ct. has original jurisdiction and if a Bill is brought to set aside a judgment rendered in the Supr. Ct. or concerning a cause pending before the Supr. Ct. the Supr. Ct. has original jurisdiction whatever be the sum in dispute.

In England an appeal is made from Chancery to the house of lords but in Court of Appeal it may be brought & carry the question from the County to the Supr. Ct. & from the Supr. Ct. to the supreme Ct. (by statute).

(50.)

Injunctions.

The injunction is in the nature of a prohibitory writ restraining a party from doing what w^t be let injunct ag^t equity or ^{savcnc} practice. Where a party is commanded to do something the decree is called an order

3 Bac 173 Injunct. The most usual injunction is that intended to restrain a party from proceedings at law so that where a party is proceeding at law & where at law he might recover yet if there are equitable reasons ag^t his ^{recovery} proceeding at law an injunction issues ag^t proceeding at law & if the bill

6 Mor 16. But Equity can never issue an injunction to stay

3 Bac 173. proceedings in a criminal case. for Equity has no executable criminal jurisdiction. The only offence wh^t that Ct. can punish is a contempt, and if a Ct. of Cr^t sh^t interfere in a crimi^t case the Ct. of B.R. w^t protect any one who sh^t proceed contrary to the injunction.

1 Br. 657 A Ct. of County may enjoin a tent not to commit waste in favor of remaindermen and reversioners

1 Pow 29:30

1 Mif 124.

1 Eq: ca 221.

Bl 127.

Injunction ag^t Waste.

In s u d e n t o n to stay waste w^t be granted
in every case where an action of waste w^t lie
at common law & in various other cases as 1 Wm 23.
an injunction may be granted to stay waste 3 Atk 94.
in favour of one who is not the immediate 723.
remainder or reversion for this can be no 3 Bl 227
w i m y to the immediate remainder man.

A mortgage may have an injunction to stay 3 Atk 23
waste ag^t mortgage for the mortgage has no 1 Wm 70.
right to diminish the value of the security &
tho' the mortgagee may recover possession by eject-
ment yet he needs a more speedy remedy.

On the other hand an injunction may be had 3 Atk 723.
ag^t the mortgagee in possession in the case of
trees unless it will apply the value to the debt
and probably in case of destroying buildings an
absolute injunction. But in this case no
action at law w^t lie,

Injunctions agt waste

(32) If ten't with impeachment for waste is
about to commit or is committing more waste
1 Vene 23. waste he may be enjoined. as from destroying
2 Vene 78. ornamental trees. not timber.

Arch 107.

2 Mch 89.

3 Ath 215

1 Ves 264.

2 Vene 738. An such a ten't may be compelled by decree to
Proc & chas H. repair waste of this kind already committed.
1 C. & C. 400 tho' no reward exists at common law

And an injunction may issue agt the person
having the legal inheritance where he is more
at stake.

Resca 221. And an injunction may be granted agt ten't
in fact after possibility to prevent attempting unreasonable
waste

Injunctions of Nuisances

So an injunction may be issued to restrain
nuisances of a permanent nature, as to
prevent one's building so as to obstruct ancient & v. 1452
lighty. an action here indeed lies at law, but 1 Ves 1453
the preventive remedy afforded by chancery is better.

So an injunction will lie to prevent
one from practicing an unhealthy & noisome
trade near the house &c of another,

Again an injunction may issue to prevent 1 Inst 29
a person from building on another's land until 3 Inst 17th
the question of right is determined.

In these cases the injunction does immediately
enforce it but if the right is determined
to be in a the injunction is made permanent
but since the injunction is dissolved.

With regard to nuisances injunction will be 3 Inst 750.
granted only agt common law nuisances 2 Roll 139.
140.

(54) Injunctions, Powers of Chancery

and an injunction is never granted to restrain ordinary trespasses for ~~for~~ these the 30th 31 remedy at law is deemed adequate.

Finalities.

3 Bac 69.
"Obig." Where a stipulated sum in the form a penalty
is only in terrores a ~~b~~ of equity will grant
relief ~~but~~ —

And an injunction will lie to stay proceedings
at law until a bill of discovery shall be
filed & an answer made by the party in
Chancery wh^{ch} the party may make use of
at law.

Acc in 5. 261. Injunctions are sometimes granted to establish
Br. 26 266. the prevailing party's title when harassed by
Paru 10. a great number of suit in ejectment. this is
Str. 404. sometimes called a bill of peace. There formerly
1 P. M. C. 676. was some doubt whether Equity had a right to grant
1. Tunc 308. an injunction in such a case. And the court of
5. 2 L. 438. q. no other case in wh^{ch} an injunction similar
to this can be granted — This injunction
is always a perpetual —

1 Ven 156.
Secth 382. Injunctions are sometimes granted to quiet a person
in the possession of an equitable estate agt a
person having the more legal title —

Injunctions may be granted to prevent a multiplicity of suits in other cases than in ejectment. Thus where several tenants of a manor claimed each for himself a right to a fair for at law this case might be determined indeed but not with as many suits as there were parties but in Equity it may all be determined in one suit.

Miford 4.104
127.8.

Nern 32

308. 266.

Princ in Ch.
261.

1 Atk 282.

2 Atk 484.

3 Bl 438.9.

And thus also where there is a question of boundaries between a dozen parties -

While a suit is pending in the ecclesiastical court 18 Ed 179 between several claiming to be an Eq. or adm'r 16 Ed 683. an injunction may issue to prevent any of the Ray. 93. claimants from intermeddling with the estate until 2 Ric 410. the question is determined in the prerogative Exch. d 1.15 Corkt. or 12.

This will grant a provisional injunction to Nov 189 stay proceedings at law on suggestion of fraud & maladministration in obtaining the bond &c until the question of whether fraud can be investigated in Eq. and if so - it is found that the bond was fraudulently obtained the injunction is made perpetual. contra it is deplored, — In w^t Eq do this unless the fraud is one wh^t cannot be tried at law or unless a discovery is sought or something of the kind for the two & t^t having concurrent jurisdiction the Ct. wh^t first gets the cause has a right to proceed & unless he acts supta.

Powers of Chancery. Lit. any property.

(5) Distraintons are frequent in favour of authors
to restrain third persons from publishing their
works. and on the same principle an injunction
may issue in favour of any patent right - new
inventions.

Chancery 124.
17 Chancery 30.
M. & T. 124.
112 Chancery 120.

275. 127.

Since the St of Ann's literary property is secured
4 June 1803 to the author. formerly actions of law were
commonly brought to recover damages. It was supposed to
be in Chancery but it is now settled that
at common law / in the case of Miller & Taylor
the author of any literary work has the
Judges agt. sole right of first printing it and that
three
he may maintain an action on the case
agt any one who violates this right by printing
the work without permission of the author

2: question was whether the author by publishing
one edition loses his exclusive right of printing
Judge of four,
it was decided that he did not. & that no
person has a right to print from the first
edition

3: Question was whether this common law remedy
by action was taken away by the statute.
This was decided that it was by 6 to 5. but
Ed Mansfield was the other way of thinking
but did not vote. because he decided the case in
B.R. & in B.R. it was decided that the C.S.
action is not taken away by the Statute
that an author not complying with the St may sue at C.S.

We have a Stat. similar to the St of Ann. enacted
by Congress.

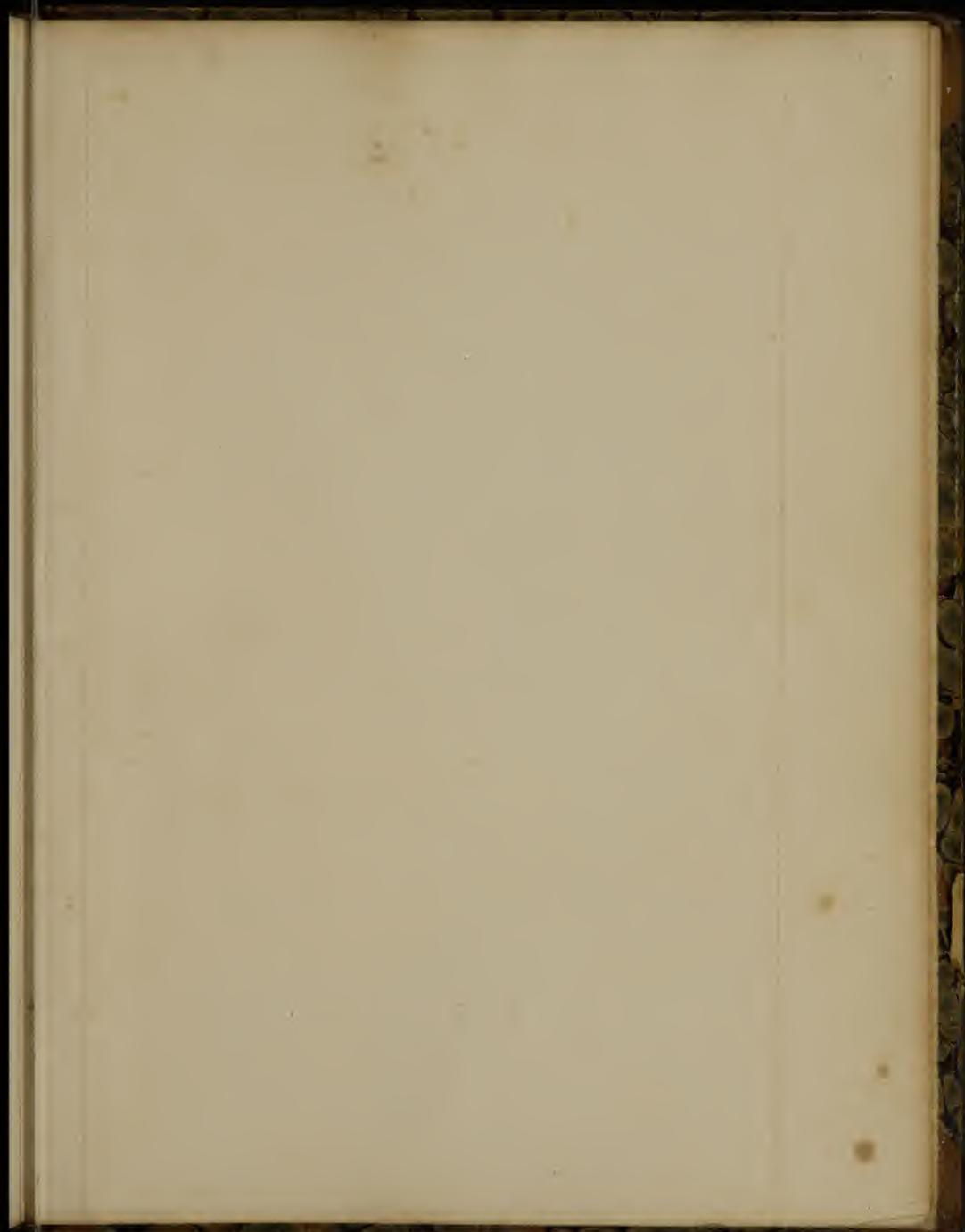
(Pickford & Hood 77 R) The C.S. remedy by
action remains for 28 yrs, the time limited by
the Stat. But by the case of Miller & Taylor it extends
no longer

Where a judg^t at law by reason of any thing
supereruent^{ent} ought not in Equity to be enforced & where there is no relief at law ch 2 w
a Ct of Equity will relieve ag^t it by injunction - or by ordering satisfaction
to be rendered on the judg^t -

Conn. & D^r

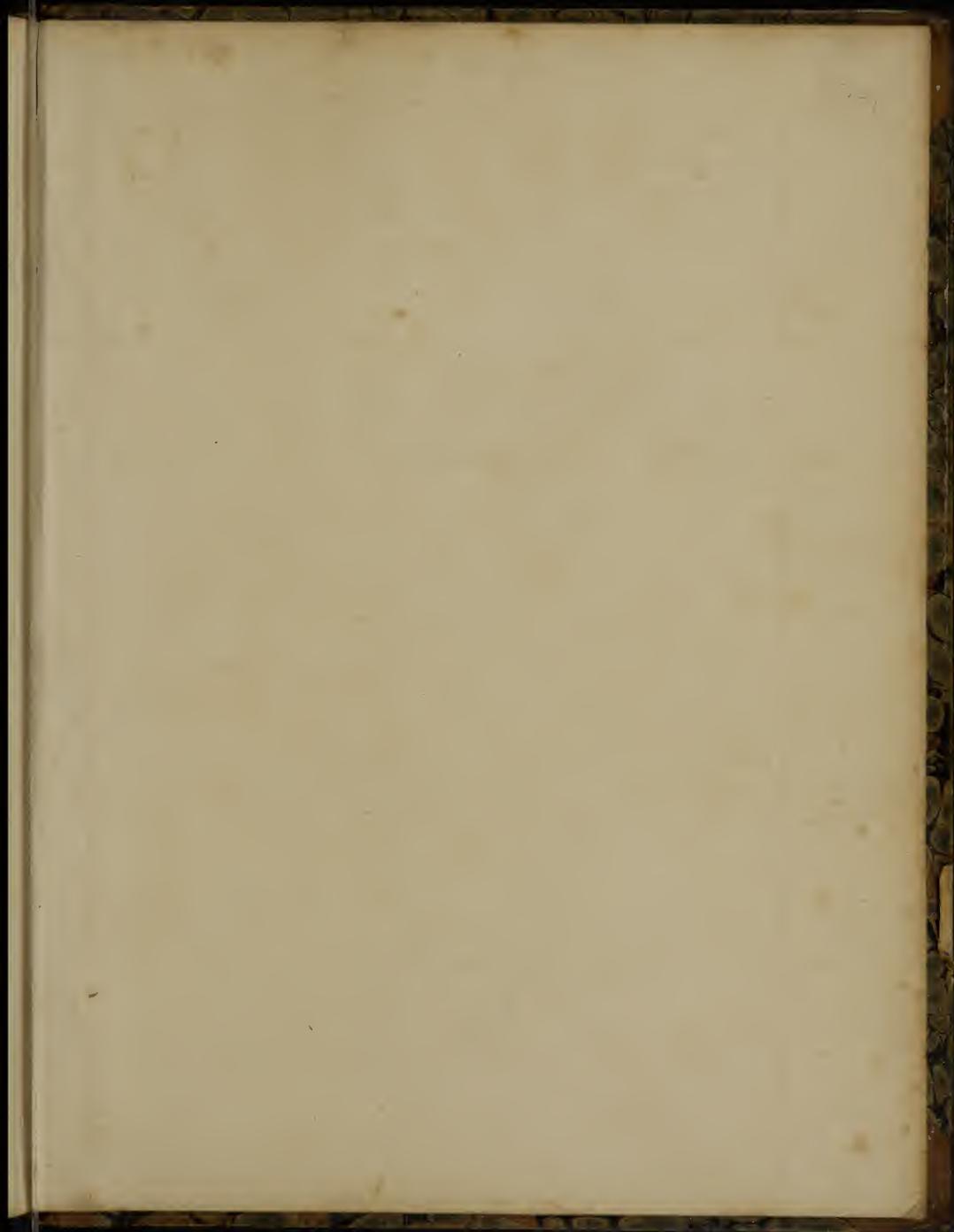
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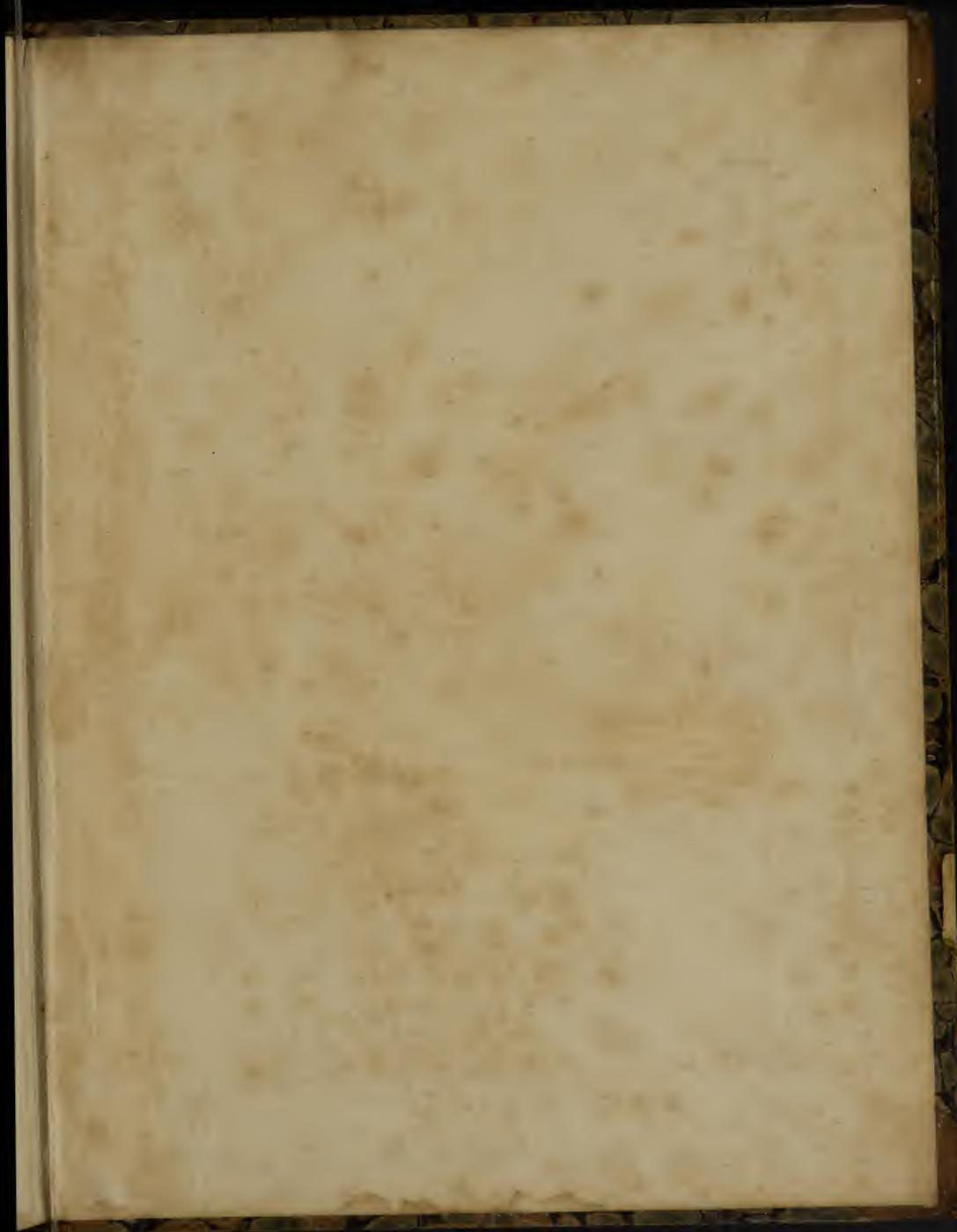


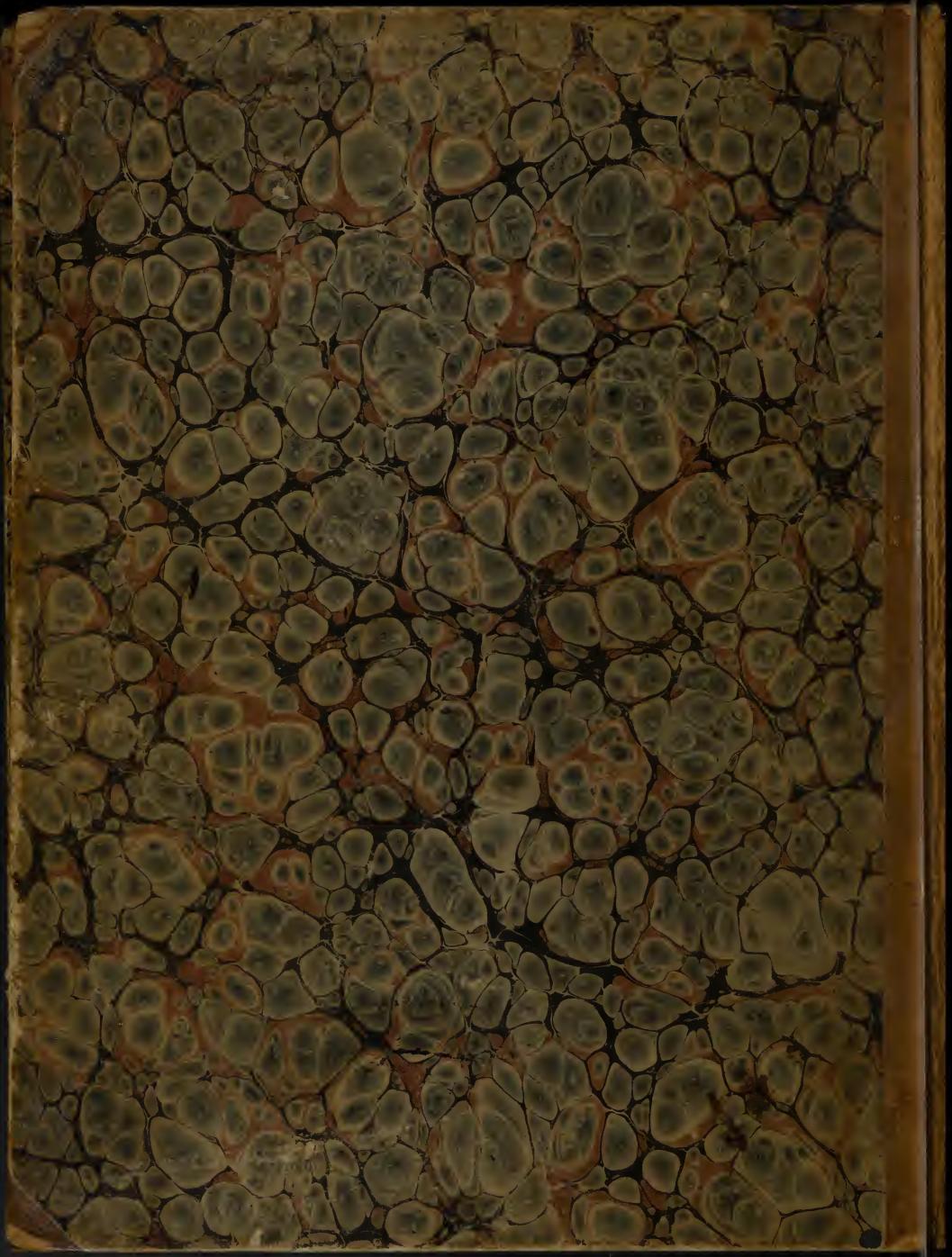
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